

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [REDACTED] 1920

No. [REDACTED] 88

THE UNITED STATES, PETITIONER,

vs.

NORTHERN PACIFIC RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 21, 1920.
CERTIORARI AND RETURN FILED MAY 12, 1920.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

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No. 339.

THE UNITED STATES, PETITIONER,

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NORTHERN PACIFIC RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December term, 1918, of said court, before the Honorable Walter H. Sanborn, circuit judge, and the Honorable Jacob Trieber, district judge.

Attest:

[SEAL.]

E. E. KOCH,

*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Be it remembered that heretofore, to wit, on the fourth day of March, A. D. 1918, a transcript of record pursuant to a writ of error directed to the District Court of the United States for the District of Minnesota, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein The United States of America was plaintiff in error and the Northern Pacific Railway Company was defendant in error, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, is in the words and figures following, to wit:

1 United States District Court, District of Minnesota, Fifth Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, DEFENDANT. | No. 457.

APPEARANCES.

Alfred Jaques, Esq., United States Attorney, and Roscoe Walters, Esq., attorneys for the plaintiff.

Messrs. C. W. Bunn and D. T. Lyons, attorneys for defendant.

Pleas before the Honorable the judges of the United States District Court for the District of Minnesota.

Be it remembered that on the 16th day of December, A. D. 1916, came the plaintiff above named, by Alfred Jaques, Esq., its attorney, and filed in the clerk's office of said court, its complaint in the words and figures following, to wit:

COMPLAINT.

In the District Court of the United States for the District of Minnesota, Fifth Division.

I. C. C. #3359.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, DEFENDANT. | No. —.

Now comes the United States of America, by Alfred Jaques, United States attorney for the district of Minnesota, and brings this

"action on behalf of the United States against the Northern Pacific Railway Company, a corporation organized and doing business under the laws of the State of Wisconsin, and having an office and place of business at Duluth, in the State of Minnesota; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

For a first cause of action plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Minnesota.

Plaintiff further alleges that in violation of the act of Congress, known as the safety appliance act, approved March 2, 1893 (27 Statutes at Large, 531), as amended by an act approved April 1, 1896 (29 Statutes at Large, 85), as amended by an act approved March 2, 1903 (32 Statutes at Large, 943), and as modified by an order of the Interstate Commerce Commission of June 6, 1910, which order was made in pursuance of the provisions and requirements of the aforesaid amendment of March 2, 1903, and is in words and figures following, to wit:

It is ordered: That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the safety appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated.

defendant, on September 21, 1910, operated on its line of railroad one train, to wit, its own Transfer, consisting of 48 cars, drawn by locomotive engine N. P. No. 82, said train being one operated with power or train brakes over a part of a through highway of interstate commerce.

Plaintiff further alleges that on said date defendant operated said train as aforesaid over its line of railroad in and about Duluth in the State of Minnesota, within the jurisdiction of this court, when none of said cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, and when less than 85 per cent of the cars which composed said train had their brakes used and operated or so assembled and connected that they could be used and operated by the engineer of said locomotive engine drawing said train.

Plaintiff further alleges that by reason of the said violation of the said act of Congress defendant is liable to the plaintiff in the sum of one hundred dollars.

For a second cause of action plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Minnesota.

Plaintiff further alleges that in violation of the act of Congress, known as the safety appliance act, approved March 2, 1893 (27 Statutes at Large, 531), as amended by an act approved April 1, 1896 (29 Statutes at Large, 85), as amended by an act approved March 2, 1903 (32 Statutes at Large, 943), and as modified by an order of the Interstate Commerce Commission of June 6, 1910, which order was made in pursuance of the provisions and requirements of the aforesaid amendment of March 2, 1903, and is in the words and figures following, to wit:

It is ordered: That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the safety appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated.

defendant, on September 22, 1916, operated on its line of railroad one train, to wit, its own transfer, consisting of 40 cars, drawn by locomotive engine N. P. No. 82, said train being one operated with power or train brakes over a part of a through highway of interstate commerce.

Plaintiff further alleges that on said date defendant operated said train as aforesaid over its line of railroad in and about Duluth, in the State of Minnesota, within the jurisdiction of this court, when only 10 cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, and when less than 85 per cent of the cars which composed said train had their brakes used and operated or so assembled and connected that they could be used and operated by the engineer of said locomotive engine drawing said train.

Plaintiff further alleges that by reason of the said violation of the said act of Congress defendant is liable to the plaintiff in the sum of one hundred dollars.

For a third cause of action plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Minnesota.

Plaintiff further alleges that in violation of the act of Congress approved April 14, 1910 (contained in 36 Statutes at Large, page 298), said defendant, on September 22, 1916, hauled on its standard gauge line of railroad one freight car, to wit, its own flat car No. 62728, over a part of a through highway of interstate commerce.

Plaintiff further alleges that on said date said defendant hauled said car as aforesaid over its line of railroad in and about Duluth in the State of Minnesota, within the jurisdiction of this court, when the height of the drawbar on the "B" end of said car, measured perpendicularly from the level of the tops of the rails

to the center line of said drawbar, was thirty-six (36) inches, and when the height of said drawbar should not have been more than thirty-four and one-half (34½) inches, as prescribed by an order of the Interstate Commerce Commission of October 10, 1910, which order was made in pursuance of the provisions and requirements of section 3 of the aforesaid act of April 14, 1910.

Plaintiff further alleges that by reason of the violation of said act of Congress said defendant is liable to plaintiff in the sum of one hundred dollars.

For a fourth cause of action plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Minnesota.

Plaintiff further alleges that in violation of the act of Congress approved April 14, 1910 (contained in 36 Statutes at Large, page 298), said defendant, on September 22, 1916, hauled on its standard gauge line of railroad one freight car, to wit, its own flat No. 62971, over a part of a through highway of interstate commerce.

Plaintiff further alleges that on said date said defendant hauled said car as aforesaid over its line of railroad in and about Duluth, in the State of Minnesota, within the jurisdiction of this court, when the height of the drawbar on the "B" end of said car, measured perpendicularly from the level of the tops of the rails to the center line of said drawbar, was thirty-six and one-half (36½) inches, and when the height of said drawbar should not have been more than thirty-four and one-half (34½) inches, as prescribed by an order of the Interstate Commerce Commission of October 10, 1910, which order was made in pursuance of the provisions and requirements of section 3 of the aforesaid act of April 14, 1910.

Plaintiff further alleges that by reason of the violation of said act of Congress said defendant is liable to plaintiff in the sum of one hundred dollars.

For a fifth cause of action plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Minnesota.

5 Plaintiff further alleges that in violation of the act of Congress known as the safety appliance act, approved March 2, 1893 (contained in 27 Statutes at Large, page 331), as amended by an act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), defendant, on September 22, 1916, hauled on its line of railroad one car, to wit, its own gondola No. 917, over a part of a through highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad in and about Duluth, in the State of Minnesota, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "A" end of said car was out of repair and inoperative, the lock line of the coupler on

said end of said car being broken, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by section 2 of the safety appliance act, as amended by section 1 of the act of March 2, 1893.

Plaintiff further alleges that by reason of the violation of the said act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

For a sixth cause of action plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in inter-state commerce by railroad in the State of Minnesota.

Plaintiff further alleges that in violation of the act of Congress, known as the safety appliance act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), defendant, on September 23, 1916, hauled on its line of railroad over a part of a through highway of interstate commerce, one car, to wit, C. & N. W. gondola No. 104921.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad in and about Duluth, in the State of Minnesota, within the jurisdiction of this court, when the grab iron or handhold on the left-hand side of the "B" end of said car was loose at the left-hand end and hanging, and when said end of said car was not provided with secure grab irons or handholds for greater security to men in coupling and uncoupling cars, as required by section 4 of said safety appliance act, as amended.

Plaintiff further alleges that by reason of the violation of said act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

For a seventh cause of action plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Minnesota.

Plaintiff further alleges that in violation of the act of Congress approved April 14, 1910 (contained in 36 Statutes at Large, page 298), said defendant, on October 21, 1916, hauled on its line of railroad one car, to wit, its own stock No. 28453, over a part of a through highway of interstate commerce.

Plaintiff further alleges that on said date said defendant hauled said car as aforesaid over its line of railroad from Little Falls, in the State of Minnesota, toward Brainerd, in said State, within the jurisdiction of this court, when the hand brake on said car was out of repair and inefficient, the hand-brake chain being broken and disconnected, and when said car was not equipped with an efficient hand brake, as required by section 2 of the aforesaid act of April 14, 1910.

Plaintiff further alleges that by reason of the violation of said act of Congress, said defendant is liable to plaintiff in the sum of one hundred dollars.

For an eighth cause of action plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Minnesota.

Plaintiff further alleges that in violation of the act of Congress known as the safety appliance act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), defendant, on October 24, 1916, hauled on its line of railroad one car, to wit, C. T. H. & S. E. coal No. 12576,

over a part of a through highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad from Little Falls, in the State of Minnesota, toward Brainerd, in said State, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "A" end of said car was out of repair and inoperative, the uncoupling chain on said end of said car being broken and disconnected, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically, by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by section 2 of the safety appliance act, as amended by section 1 of the act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

For a ninth cause of action plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Minnesota.

Plaintiff further alleges that in violation of the act of Congress approved April 14, 1910 (contained in 36 Statutes at Large, page 238), said defendant on October 25, 1916, hauled on its line of railroad one car, to wit: Ft. W. & D. stock No. 3263, over a part of a through highway of interstate commerce.

Plaintiff further alleges that on said date said defendant hauled said car as aforesaid over its line of railroad from Brainerd, in the State of Minnesota, toward Little Falls, in said State, within the jurisdiction of this court, when the ladder on the right-hand end of the side of said car near the "B" end thereof was out of repair and insecure, the outer end of the third tread from the top of said ladder on said end of said car being broken and hanging loose, said car being one requiring secure ladders, and when said car was not equipped with secure ladders, as required by section 2 of the aforesaid act of April 14, 1910.

Plaintiff further alleges that by reason of the violation of said act of Congress, said defendant is liable to plaintiff in the sum of one hundred dollars.

Wherefore, plaintiff prays judgment against said defendant in the sum of nine hundred dollars and its costs herein expended.

ALFRED JAQUES,
United States Attorney.

Endorsed: Filed in the District Court on Dec. 16, 1916.

And thereupon, upon application of said attorney, a summons was duly issued out of said court and under the seal thereof duly vested, which was thereafter on the 22nd day of December, A. D. 1916, returned and filed on the clerk's office with the marshal's return thereto attached as served December 19, 1916.

ANSWER.

Now comes the defendant, and for its answer to the complaint of the plaintiff herein, admits that it is a railway corporation organized under the laws of the State of Wisconsin and doing business in the State of Minnesota and elsewhere.

Answering the first cause of action, defendant admits that on September 21, 1916, its engine No. 82 hauled 48 cars in the city of Duluth, in the State of Minnesota, when none of the cars had their brakes used and operated by the engineer of the locomotive drawing said cars. Alleges that said cars were merely being switched in defendant's yard at the time they were so operated.

Answering the second cause of action, defendant admits that on September 22, 1916, its engine No. 82 hauled 40 cars in Duluth, in the State of Minnesota, when less than 85 per cent of the cars had their brakes so connected that they could be used and operated by the engineer of the locomotive drawing said cars. Alleges that at the time these cars were so operated they were being switched in defendant's yard.

Save as hereinbefore admitted, defendant denies each and every allegation in said complaint contained.

Wherefore, defendant prays that this complaint be dismissed.

C. M. B. & D. F. Lyons,
Attorneys for Defendant.
1018 Northern Pacific Bldg.,
Saint Paul, Minnesota.

Endorsed: Filed in the District Court on January 9, 1917.

The above-entitled action coming on this day to be tried to the court and jury, the plaintiff in said action the United States of America, appears by Alfred Jaques, Esq., United States attorney,

and Roscoe Walters, Esq., and the defendant Northern Pacific Railway Company, appears by D. F. Lyons, Esq., its attorney. Whereupon a jury having been called comes as follows, to wit: G. E. Goodrich, George H. Morgan, H. R. Patterson, W. P. Hogan, J. J. Morgan, William Martin, P. C. Lynch, William Mick, O. E. Bowers, W. O. Bartlett, Frank McConville and L. A. Larson, being twelve free and lawful men who are duly impaneled as a jury and sworn to try the issues joined herein.

The further trial of this cause is continued until ten o'clock a. m. of the following day.

TRIAL, JULY 11, 1917.

The above-entitled cause came on this day to be further tried to the court and jury, the parties thereto appearing by their attorneys, respectively, as on the preceding day, and the further trial of said cause proceeds as follows:

It is hereby agreed between counsel for the respective parties that liability is admitted on all causes of action except the first and second and to dismiss the third cause of action.

Mr. Roscoe Walters opens and states the case to the court and jury on the part of the plaintiff.

Allen H. Leonhard is sworn, is examined and testifies as a witness on the part of the plaintiff.

Howard W. Burch is sworn, is examined and testifies as a witness on the part of the plaintiff.

W. H. Strachan is sworn, is examined and testifies as a witness on the part of the plaintiff.

William McWatty is sworn, is examined and testifies as a witness on the part of the plaintiff.

Orlen E. Owens is sworn, is examined and testifies as a witness on the part of the plaintiff.

Howard M. Burch is recalled and further testifies as a witness on the part of the plaintiff.

Joe Stricklan is sworn, is examined and testifies as a witness on the part of the plaintiff.

10 And here the plaintiff rests its case.

Mr. Lyons opens and states the case to the court and jury on the part of the defendant.

W. H. Strachan is examined and testifies as a witness on the part of the defendant.

G. W. Atmore is sworn, is examined and testifies as a witness on the part of the defendant.

And here the defendant rests its case.

Howard M. Burch is recalled and further testifies as a witness on the part of the plaintiff in rebuttal.

And here again the plaintiff rests its case and the testimony is closed.

The attorney for the said defendant here moves the court to instruct the jury to find a verdict in favor [in favor] of the defendant as to the first and second causes of action.

And the further trial of this cause is continued until tomorrow morning at ten o'clock.

TRIAL, VERDICT AND JUDGMENT, JULY 12, 1917.

The above-entitled cause came on this day to be further tried to the court and jury, the parties thereto appearing by their attorneys, respectively, as on the preceding day, and the further trial of said cause proceeds as follows:

Motion for a directed verdict as to the first and second causes of action heretofore made is argued by the attorneys for the respective parties, and after hearing the arguments and statements of counsel the court grants said motion, to which ruling plaintiff duly excepted, which exception was allowed by the court. Thereupon the jury, by direction of the court, instanter, and without leaving the box, return the following verdict:

"We, the jury in the above-entitled action, by direction of the court, do find in favor of the defendant on the first and second causes of action.

L. A. LARSON, *Foreman.*"

Defendant here consents that judgment be entered in favor of plaintiff in the sum of one hundred dollars and costs on each of the other causes of action except the third which has been dismissed.

11. Thereupon, in accordance with said verdict, it is by the court.

Considered, ordered and adjudged, that the plaintiff herein, the United States of America, take nothing by this its said first and second causes of said action, and that the defendants herein, The Northern Pacific Railway Company do go hence without day.

And pursuant to the foregoing consent, it is by the court considered, ordered and adjudged, that the plaintiff herein, The United States of America, do have and recover of and from the defendant, The Northern Pacific Railway Company, the sum of six hundred dollars (\$600.00) being one hundred dollars on each of the fourth, fifth, sixth, seventh, eighth and ninth causes of action, together with the costs and disbursements of plaintiff in this behalf expended, to be taxed, and that plaintiff do have execution therefor.

It is further ordered that execution and all other proceedings herein be and the same hereby are stayed for a period of ninety (90) days from this day in order that said defendant may prepare and present a bill of exceptions and make a motion for a new trial.

BILL OF EXCEPTIONS.

Filed in the U. S. District Court Jan. 5, 1918.

The above entitled action came on for trial at the July, A. D. 1917 term of said court, on the 10th day of July, 1917, the Honorable Page Morris, one of the judges of the said court, presiding.

Alfred Jaques, Esq., U. S. district attorney, and Roscoe F. Walters, Esq., appeared on behalf of the Government, and

D. F. Lyons, Esq., appeared on behalf of the defendant.

A jury was impaneled to try the action, and thereupon the following proceedings were had therein, to wit:

Mr. JAQUES. In case United States vs. Northern Pacific Railway, No. ——, count three is dismissed without prejudice.

Mr. LYONS. No defense as to counts Nos. 4, 6, 7, and 8. The company will confess judgment, and will also confess judgment on the 9th cause of action, after looking up the record.

12 Mr. JAQUES. This case now for trial is on the first and second counts, the same case as at the last term.

Adjourned to 10:00 a. m., Wednesday, July 12, 1917.

LENHART.

Proceedings of morning session, July 11, 1917, 10 o'clock.

Allen H. Lenhart, called as a witness on behalf of the Government, and being first duly sworn, testified as follows, to wit:

Examination in chief by Mr. WALTERS:

Q. What is your business, Mr. Lenhart?

A. I am employed as an inspector by the Interstate Commerce Commission.

Q. What do you inspect in that capacity?

A. I work around railway equipment principally.

Q. With respect to what?

A. With respect to safety appliances.

Q. Were you such inspector on September 22, 1916?

A. I was.

Q. Where were you at work?

A. At Duluth, Minnesota.

Q. In the inspection of what company?

A. Northern Pacific Railway Company.

Q. Did you on that day inspect a transfer known as Northern Pacific Train No. 82?

A. I did.

Q. I will ask you what experience, if any, you have had in the railroad business?

A. About twenty years as trainman and conductor.

Q. How many years as a trainman?

A. About seven and a half years.

Q. And the remainder of the time as conductor?

A. Yes.

Q. For what company?

A. For different companies—Bessemer & Lake Erie Line, and other companies.

Q. In what territory?

A. In Pennsylvania.

Q. Will you describe what you found with respect to this particular transfer, where you discovered it, when, and what was done with it?

A. This was on the 22nd of September. This engine, No. 82, and forty cars from West Duluth to Rices Point didn't have air brakes—the air brakes were not coupled up between the tenth car and the 11th. The first ten cars next the engine, the air brakes was in use, the balance of the train it wasn't.

13 Q. Where did you first see this string of cars?

A. At the furnace yard, in West Duluth.

Q. At what time of day?

A. Well, we saw some of these cars different times during the morning. The string of cars left there at 10.55.

Q. Did you say the railroad company assembled these cars and put them together in one string?

A. Yes, sir.

Q. Where was that done?

A. They were on what is known as track 3, in the furnace yard.

A paper marked for identification as Government's Exhibit 1.

Q. I hand you Government's Exhibit 1. Will you state what that is?

A. A blue print, or map, showing the railroad over which this train was moved from the furnace yard at West Duluth. It followed this red line here [indicating on map], over to Rices Point yard, on this side.

Q. Which side of the map, now, is north?

A. Toward you.

Q. The top of the map is north, and the left-hand end of the map is west?

A. Yes.

Q. The furnace yard is F, on the left-hand end of the map?

A. Yes.

Q. Is that in the neighborhood of the points marked A and B, on the red line?

A. It is.

Q. Along the red line?

A. Yes.

Q. You saw this transfer leave that furnace yard?

A. Yes, sir.

Q. Going in what direction?

A. In a generally eastern direction.

Q. Did you state what time of day that train left there?

A. 10:55 a. m.

Q. Where did it go immediately upon leaving the furnace yard?

A. Track No. 3 is this—represented by this inside red line here; pulled out through this crossover into this track, followed on the red line to this point marked C, where that crosses the Duluth, Winnipeg & Pacific Railroad, then onto this point marked D, where they cross the Soo Line and South Shore roads.

Q. What railroad do you mean when you say the "South Shore?"

A. The Duluth, South Shore & Atlantic—then followed on down through here to this point—

Q. To what point?

14 A. Point E, where they crossed the Duluth, Winnipeg and Pacific lumber spur, then on down through, followed this red line, passed the Boston yard—this point here, the Northern Pacific, down to point G. At point G the Northern Pacific has a crossing there to this coal dock.

The COURT. On the grade?

The WITNESS. Yes, sir. Then past, under the Duluth, Missabe & Northern ore docks, at this point marked H, that crosses the Duluth, Missabe & Northern Railway, going out to this coal dock—this coal and stone dock, then a little further east, crossing at I, and then across the Duluth, Missabe & Northern again, where they go through into their coal dock, and I think they follow the line up here [indicating on map] at about, I think, 27th street, or avenue west, where there is a street crossing. Just east of this point marked J is a rock cut, where the track curves—well, it starts in the cut and crosses here to the left, or the north. Here at this point that is marked K there is a crossing, a street crossing, used by street cars, and used by teams and vehicles.

By Mr. LYONS:

Q. That is graded?

A. Yes, that is graded. Then follows this red line, on down here, to about where it is marked [marked] L, on Twentieth Avenue, where they go to this Y track, and which leads into Rices Point yard, parallel with Garfield Avenue.

Q. You refer to one crossing marked at K. Is that used by the traffic at grade?

A. Yes, sir.

Q. Is there a street crossing or road crossing?

A. Yes, a road crossing.

Q. Is there any other street or road crossing on this track that was crossed by this transfer?

A. Only this point marked F, at Forty-fifth Avenue, I think.

Q. Are these two street crossings open to active traffic, or were they at that time?

A. They were at that time. I have seen them in use.

Mr. WALTERS. We offer Government's Exhibit 1 in evidence.

Received without objection.

Q. (By Mr. WALTERS). Does this map show all of the Northern Pacific tracks—the switching tracks there? Point out the switching tracks there.

A. There may be several that are not shown, but I think most of them are shown.

15 Mr. LYONS. There is no objection to that as showing the general situation there. I don't think it shows all the tracks.

The WITNESS. I think there are some in the Boston yard, and in the Berwind yard, but these are inside tracks.

By Mr. WALTERS:

Q. Referring to the drawing on the blackboard, which may be of some assistance to the court and jury, that is a rough representation of the situation in and about Duluth with reference to the movement of this transfer, is it?

A. Yes, that is approximately a sketch.

Q. I note that along this line, beginning at the furnace yard, there are letters, C, D, E, F, G, H, I, J and K—are these letters at the point they appear—do these same letters appear on Government's Exhibit 1?

A. They are approximately so.

Q. Are these transfers about which I am asking you, the ones that moved September 21 and September 22?

A. It was the one on September 22.

Q. That is the transfer mentioned in the second count, I believe, is it not?

A. I believe it is.

Q. The transfer mentioned in the first count, when did you say that moved?

A. That was, I think, on the 21st.

Q. Where did you first see the cars in that transfer?

A. Saw these at Rices Point yard.

Q. How many cars were in that transfer?

A. Forty-eight, I think.

Q. At what time of day was it they left there?

A. They left there at 1.40 p. m.

Q. Did you see these cars assembled together in the Rices Point yard?

A. No, I did not. They were assembled when I first saw them.

Q. How many cars were in that transfer?

A. Forty-eight.

Q. Was the air coupled up between any of those cars?

A. No, sir, it was not.

Q. At what time did you state the transfer left Rices Point yard?

A. 1.40 p. m.

Q. Did this transfer move over the same line as the one mentioned in count 2?

A. The same line, but in the opposite direction.

Q. They started down at the east end?

A. At Rices Point, started and went west.

Q. Now, with regard to this transfer, did it make any stops between the time it left Rices Point yard to the time it arrived at the furnace yard in the west end?

A. I couldn't say. I didn't go out with it on that day.

16 Q. You didn't follow it?

A. No, sir.

Q. That is in count one, that you said was going west?

A. In count 2, going east. I rode that transfer.

Q. With regard to count 2, the transfer mentioned, did it make any stops between the furnace yard and Rices Point yard?

A. Yes, sir.

Q. At what point did it stop?

A. Stopped at these two railway crossings here [indicating]—stopped at these two, and stopped again here at—well, close to point marked G, along the Missabe ore docks. I think that was all until they got down here to go into the yard.

Q. Made two stops?

A. That's all I recall, was two stops.

Q. Were any cars set out of that transfer from the time it left the furnace yard until it arrived at Rices Point yard?

A. No, sir.

Q. And what speed was made by that transfer in making that move?

A. It varied, I should say, from possibly three miles an hour, to possibly eighteen miles an hour, at times.

Q. Do you know what the distance is between these two points, the furnace yard and Rices Point yard?

A. It would be an estimate—only an estimate, I should say in the neighborhood of four miles from Rices Point, where it started, to where it stopped.

Q. I believe you stated you didn't accompany the transfer from Rices Point to the furnace yard?

A. No, I did not.

Q. Can you state whether any cars were set out in making that movement?

A. No, sir, I can not.

Q. Are you acquainted with the character of trains that cross over this line at point C there, by the Duluth, Winnipeg & Pacific Railway?

A. Yes.

Q. What kind of trains cross that particular point?

A. Just freight trains, all freight trains, I think.

Q. All freight trains that cross over the D., W. & P. at point C?

A. Yes.

Q. And they are hauled by the D., W. & P.?

A. Yes, sir.

Q. That line at the D., W. & P., where does it run from and to, if you know?

A. It runs from the D., W. & P. yard at West Duluth, at first, then in a more northwesterly direction, and over to Superior, across the Grassy Point bridge, and up the other side.

Q. And is that the only line they have, that runs from Duluth to Superior?

A. I think it is.

Q. Now, with regard to the next railroad track here at point D, I believe you stated that the Duluth, South Shore & Atlantic operated trains over that line?

A. Yes.

17 Q. Do you know what class of trains were operated over that line?

A. The Soo line operated both freight and passenger trains—the Soo and South Shore schedules, I think, show four passenger trains every day. I wouldn't know how many freight trains the Soo and the South Shore operated.

Q. How many passenger trains are operated?

A. I have just stated, four, I think.

Q. Four each way?

A. No, two each way.

Q. Two each way?

A. Yes.

Q. And the same is true with regard to the D. W. & P.—I mean the South Shore line?

A. Yes.

Q. So, altogether, there at that particular crossing, there was operated daily over that particular line used by this transfer eight passenger trains?

A. Yes.

Q. You have no idea as to how many freight trains are operated across the line traversed by these transfers, on these two particular lines, or the ones used by the D. W. & P., and used by the South Shore line?

A. No, I have not. As a matter of fact, a number of freight trains as to the business of the Duluth, Winnipeg & Pacific, was on what they call a switch line that goes over there every day—I don't know how many, I couldn't say just how many, on any of them.

Q. With reference to this line used by the Soo Railway and the South Shore Line, where does this line lead from and to?

A. From Duluth to Superior, and beyond.

Q. And does that line—does it or not—leading from Superior to Duluth, pass through a station in West Duluth, known as West Duluth?

A. It does.

Q. Is that located on the map, there?

A. Yes, it is approximately right here [indicating on blackboard].

The COURT. You mean on the blackboard drawing?

The WITNESS. Yes, sir.

By Mr. WALTERS:

Q. You say "right here, approximately," where do you mean?

A. At this point marked with a square.

Q. The point which is marked here, West Duluth Soo Line Station?

A. Yes.

Q. Do you know what speed was made by this train, this transfer, at the time it crossed the line of the Duluth, Winnipeg & Pacific, and Soo Line, at points C and D?

18 A. Well, the speed varied, because they stopped west of the crossing marked C, and then started over the crossing and slowed down here, and as they pulled over, of course, the speed increased.

Q. What was the next railroad crossing passed by this transfer, going from the furnace to Rices Point yard?

A. That would be this point marked D, and marked E, which leads out to the D. W. & P. lumber dock. That is a crossing at grade; they don't stop for that.

Q. Do you know what line D is here for?

A. I think it indicates the crossing over that lumber dock.

Q. Are you familiar with the class of trains that are hauled across that?

A. I am.

Q. What kind?

A. Freight trains entirely, mostly lumber and forest products.

Q. Do you know what sized trains are hauled over there?

A. Well, I have seen fifteen to eighteen cars. I don't know whether they haul more than that or not.

Q. About what speed was made by trains crossing there at point E?

A. The Duluth, Winnipeg & Pacific?

Q. Yes.

A. Oh, I think probably four to six miles, or something like that.

Q. And what stops did these Soo and South Shore Line trains make?

A. Well, they stopped for that crossing marked A.

Q. Is the same true with regard to the D. W. & P.?

A. Yes, sir.

Q. I will ask you if there are any interlockers at this crossing?

A. There are not.

Q. What are interlockers?

A. It is an automatic—a manner of controlling appliances for operating—stopping trains at crossing—makes them safe. A train has to stop to get permission to cross by them.

Q. Where interlockers are used, is it possible for trains to run together?

A. No, sir.

Q. Under the conditions that existed at that time, on that line, at these points C, D and E, was there anything to prevent trains from running together there—anything physical there, to prevent trains running together?

A. There was nothing to prevent that.

Mr. LYONS. Objected to. We do not contend that they used inter-lockers. If they don't stop, they will go together.

The COURT. There may be nothing to prevent that, as counsel on the other side admitted.

19 By Mr. WALTERS:

Q. What is the next crossing traversed by this transfer in proceeding from the furnace yard to Rices Point yard?

A. The next would be at this point marked G. The Northern Pacific has a crossing there at grade, leading to the coal dock, used by the Northern Pacific there.

Q. Does the Northern Pacific track cross the line at right angles exactly?

A. Pretty nearly; yes.

Q. Are there any buildings around, in the neighborhood of this crossing?

A. Yes; two—one on the south side of this track—a fire house, located in this angle [indicating], and then the dock building, on out here, further south. They come up here pretty close to the track—I should say twenty to twenty-five feet from the track.

Q. Are they located on the—on that track—so as to interfere with the vision of an engineer who is moving with these transfers?

A. Yes; I should say they are. A fire engine coming up behind this building, I think it would be very difficult for the engineer to see.

Q. Is the track exactly straight there?

A. Yes; pretty nearly straight.

Q. Where is the next railroad crossing encountered by this particular transfer that was going to Rices Point?

A. At this point marked H. That crosses the Duluth, Missabe & Northern track leading out to the lumber and stone and coal dock here.

Q. Does that also cross at right angles the track used by these transfers?

A. Yes; nearly.

Q. What is the next railroad crossing encountered?

A. At this point I, along the track of the D. M. & N., going out to their coal dock—that is at grade and, I think, crossed at an angle of thirty to forty degrees—something like that.

Q. Are there any more railroad crossings encountered by this transfer going to Rices Point and before Rices Point is reached?

A. No, sir.

[—] What is there at point J?

A. A rock cut, coming up there from the east, about where this point J is; a rock cut.

Q. Was there any grade at that point?

A. There is an ascending grade further down, behind this ore dock, somewhere here about where this point J is.

Q. Does that grade ascend to the crossing or not?

A. No; I think it is descending from the furnace yard to Rices Point.

Q. Then J is the highest point?

20 A. Yes; in that neighborhood.

Q. The next point, marked K, I believe you said is where there was an open road, used by traffic?

A. Yes, sir.

Q. Is this line of track that was used by the transfers referred to used by other railroad companies?

A. Part of it.

Q. Part of this track used by other railroad companies?

A. Yes.

Q. State what part is used by other railroad companies.

A. The Duluth, Missabe and Northern use it from this point G—it is not shown on the blackboard sketch, but in Exhibit 1—a point west of the furnace yard.

Q. A distance of about what?

A. Oh, approximately—I don't know how far; I couldn't say—about a mile and a half. That is an estimate.

Q. And you state that the Duluth, Missabe & Northern Railway used it only from the point there, just east of this point marked G, where this track goes in around there in this vicinity where they start their trains. They used it at least as far as the furnace yard?

A. Yes.

Q. About what distance from the point there at point G to the furnace yard, approximately?

A. I think about a mile and a half.

The COURT. If it is four miles between the furnace yard and Rices Point yard, it is more than half way.

The WITNESS. This sketch is not drawn to scale.

The COURT. You don't think it is half way?

The WITNESS. I don't think it is quite half way.

The COURT. Is this map—this blue print—Government's Exhibit 1 drawn to scale, or is it out of proportion?

The WITNESS. I think it is pretty near half way by that.

By Mr. WALTERS:

Q. Upon that observation, what would you state was about the distance that this particular line traversed by the transfers was at that time being operated by the D. M. & N.; would you say that it was as much as two miles?

A. I don't think it is that far; that is, to this point here. I don't know how much further they used that track.

Q. Do you know, Mr. Lenhart, what class of traffic is handled by the D. M. & N. over this particular line?

A. Yes; freight traffic mostly—coal and stone, some lumber—miscellaneous.

Q. Where did they get that stone and coal?

21 A. At the D. M. & N. dock—coal dock and lumber dock, down in this yard—points H and L.

Q. Where did they take that traffic?

A. To the steel plant, I believe, most of it.

Q. Is there any other line over which they hauled that traffic?

A. I think not.

Q. What size trains do they handle over this track?

22 A. I think they average about twenty-three cars, ordinary freight cars.

Q. What kind of cars do they handle?

A. Freight cars, mostly flat.

The COUNSEL. How many cars?

The WITNESS. About twenty-three, I think, is the average.

By Mr. WALTERS:

Q. Are they heavy, steel cars?

A. Yes, heavy steel cars—hopper, coal, gondola—all kinds of freight cars.

Q. And you say they used this line for carrying coal and stone from the stone and coal docks to the steel plant?

A. Yes.

Q. Do they use that line in hauling traffic from the steel plant to the coal and stone docks?

A. They move empties back—all the stuff in coal cars going east would be handled in that manner.

Q. Do they have air coupled up in these trains?

A. They do.

Q. What speed do these trains make, if you know?

A. I think they make as high as eighteen miles an hour, in some places.

Q. When you saw that transfer move from the furnace yard to Rices Point yard, was it at that time on the track used by these D. M. & N. trains?

A. It was, part of it, at the crossover, at the furnace yard.

Q. When you saw it, it was on this track?

A. No, it was on track 3, one of the assembling tracks.

Q. At track 3, did this transfer move onto the line that was used by these D. M. & N. trains?

A. It used the crossover track, it is marked here, the letter, figure 3 there. That is the track it was on.

Q. Suppose we mark this "A," I think it is so marked on the blue print.

A. That transfer moved over the crossover track, from track 3, to this main track.

22 Q. Approximately, what is the distance from point A, to the point east of G, where the D. M. & N. trains passed onto this track used by this transfer?

A. I think somewhere around about a mile.

Q. Do you know, Mr. Lenhart, whether this same track is used by any other railroad company than the Northern Pacific and the D. M. & N.?

A. The Duluth & Iron Range Railway used it some for some trains, log trains, part of it.

Q. What part of the track did they use?

A. Their log trains go down from the furnace yard, to down about in here [indicating], and down in here, and back in there at this point, to somewhere about F, and back in here to the Alger-Smith lumber mill plant, take their logs in there, and then back across here—back down there, down over those same tracks to East Duluth.

Q. Do you know where these logs handled by the Duluth & Iron Range Railroad come from?

[—] I think mostly from Knife River.

Q. From what direction do they come, when they go into Duluth?

A. They come from the east, or northeast.

Q. Do they go through the Rices Point yard?

A. No, I think they pass outside of that.

Q. Which direction, west of Rices Point yard?

A. It would be more north.

Q. They go through north of Rices Point yard there?

A. Yes.

Q. What route do they follow?

A. They follow the Northern Pacific, past the West Duluth station of the N. P., a short distance, where there is a Y, lead down through into the furnace yard.

Q. In what direction do they go after leaving the Y in the furnace yard?

A. They would go around that Y, into the furnace yard, and use these same tracks the D. M. & N. uses, down through the furnace yard. They could use any of these tracks, of course.

Q. Did they use the line that was traversed by this transfer through the point marked A, over to the steel plant, then on down to the vicinity of the point marked F?

A. I think they used that track from about here, and then followed around on these freight tracks into the yard, on a kind of crossover arrangement here at F.

Q. Then they took this log train into the Alger-Smith Lumber Company's yard, did they?

A. Yes.

Q. And there picked up empties, and what did they do with them?

23 A. They pulled them out through the freight track onto the main track at one of these places, and followed around to the right, to the Northern Pacific.

Q. Did they go out through Rices Point yard?

A. No; followed that right down here, and, about at 29th or 31st Avenue, crossed over the crossing there, to the other line of the Northern Pacific, and down in east.

Q. Do you know about what speed these log trains make over this line?

A. I don't know, probably about twelve to fifteen miles an hour.

Q. Have the D. M. & N. any other track by which they can haul these log trains into and out of the lumber company's yard?

A. I don't know of any.

Q. Is there an other way by which the Duluth, Missabe & Northern could get their trains from the coal and stone dock to the steel plant?

A. Not without going around by Proctor, and backing down another road.

Q. The fact is that that track was used by them for that purpose?

A. It was used.

Q. How far is the steel plant from the furnace yard?

A. I don't need to study it—I refer to one occasionally.

miles.

Q. That is still further west?

A. Yes, sir.

Cross-examination of Allen H. Lenhart, by Mr. LYONS:

Q. Your business for the past five years has been in connection with violations of the safety appliance act?

A. Yes.

Q. And you give particular attention to violations of that portion of the act that covers the use of air brakes, do you?

A. Not any more particularly than the other safety appliance devices.

Q. And you are, of course, familiar with all parts of it?

A. Yes.

Q. Now, railroads in this country are required to couple up 85% of air—under what circumstances?

A. Under all conditions in train service, except switching.

Q. If they have any operations in railroad work, in switching in or around any railroad yard on tracks set apart for switching operations, this rule, or law, does not apply?

A. I believe not.

Q. So that the actual wording of the law is that that applies to trains, isn't it?

A. Yes.

Q. That leads me to ask you what a train is, will you tell us?

24 Mr. WALTERS. Objected to. The Supreme Court has said what a train is—that is a question of law.

Mr. LYONS. This man speaks about main lines and trains all through his testimony. I would like to know what he means by a train.

The COURT. Well, state what you mean by a train.

Mr. WALTERS. Exception.

The WITNESS. A train, as I understand these railroad rules, is an engine with or without cars, and moving over railroad tracks.

By Mr. LYONS:

Q. Anything else?

A. And displaying markers.

Q. And on the tender if the marker is on the rear?

A. Yes.

Q. So that a train is one or more engines, coupled together, with or without cars, and displaying markers?

A. Yes.

Q. Did this transfer display any markers?

A. Any transfer movement like that—

Q. Did these transfers, Mr. Lenhart, which you are testifying about here, display any markers?

A. I don't think they did.

Q. Now, you have said that this rule does not apply in the case of yard switching, or switching on tracks set aside for switching operations, have you not?

A. Yes.

Q. What is a main line?

A. It is a track or tracks, between two stations.

Q. It is a track or tracks between two stations?

A. Yes.

Q. I don't suppose you have had occasion to study your book of rules for some years—did you testify about being familiar with the new, or the present rules?

A. I don't need to study it—I refer to one occasionally.

Q. Of course, when you were running trains, you took along a book of rules, didn't you?

A. These rules vary on different roads.

Q. They vary on different roads?

A. Yes.

Q. Very greatly?

A. It depends on the conditions.

Q. Take this particular rule as to what constitutes a main line—it is pretty nearly universal all over the United States?

A. Pretty nearly.

Q. Is not a main line this: A track running through yards and between stations, on which trains are operated by time cards, by train orders, or by block signals?

A. That would be a main track.

25 Q. That is a main track, is it not, Mr. Lenhart?

A. They might be operated in a different manner than that you have described and still be a main track.

Q. How else could a main line be operated, and still be a main track?

A. By the authority or at the direction of the yardmaster.

Q. Then any track in a switching yard is a main track if it is operated by direction of the yardmaster?

A. Not any track, but any one could be operated as a main track.

Q. Your definition of what constitutes a main track is not the definition contained in every book of rules on every railroad in the United States?

A. As I said before, they vary.

Q. Doesn't that constitute the universal rule?

A. I wouldn't say it was universal.

Q. But is not that the general rule, as I have stated it?

A. I think on the majority of railroads it is pretty nearly the rule.

Q. What constitutes a yard, in the general acceptation of that term?

A. A system of tracks used for making up trains, storing cars, and other purposes.

Q. Just complete that definition, Mr. Lenhart.

A. I think it is complete.

Q. Assuming the rule that it is a system of tracks for switching cars—

Mr. WALTERS. Objected to as not being cross-examination.

The COURT. I don't think it will do any harm to get as much information as we can. Proceed.

Mr. WALTERS. Exception.

By Mr. LYONS:

Q. Is not this what constitutes a yard or switching track: A system of tracks on which cars are switched or sorted, and on which trains move without written orders, and without time cards, and not by block signals?

A. Not in all cases.

Q. Is not that the general meaning of what constitutes a freight yard, as used by railways all over the United States?

A. Not as I understand it.

Q. Well, tell me any railway where there is any rule for a yard that is any different from that?

A. I can not tell you any railway between two terminals where work is being done, still these trains doing the work are under orders.

26 Q. They are not under orders when they are switching, are they?

[Q.] Why, they certainly are under orders from the time they leave until they get to the other end—controlled by block signals.

Q. That would be a main line movement, wouldn't it?

[Q.] It would be a main line going into this yard.

Q. You mean station yard?

A. Yes.

Q. That is getting back to a main line. I am talking about a switching yard that is not used for main line operations at all, just a switching yard. Isn't that definition I have given you the universal definition?

A. Well, in our large cities we have yards where the movements are controlled by block signals.

Q. Switching yards?

A. Switching yards.

Q. Switching is done by block signals?

A. By automatic signals, and where switches are thrown by electric buttons.

Q. Switches are thrown?

A. Yes.

Q. How are these trains operated; does the conductor or yard foreman get written orders—does he have a time-card to go by?

A. No, sir.

Q. Take this situation here at Duluth. The Northern Pacific has a main line, hasn't it, starting from the union depot, going down across Rices Point, over the N. P. bridge to Superior?

A. Yes.

Q. Why do you call that a main line?

A. It is one of the main arteries leading to points beyond, used by different sized trains.

Q. What sort of trains move over that?

A. All kinds, freight and passenger.

Q. Do they have orders?

A. Some of them.

Q. That is a track, then, a main line track. Anybody that knows anything about railroading would call it a main line track?

A. Yes.

Q. Now, is there any other main line track, using the word in the same way, that runs down—that does not cross Rices Point, runs down west, down by Twentieth Avenue, and West Duluth, and beyond?

A. Yes, there is.

Q. And is the one that is shown on the right-hand side of this [blackboard] sketch?

A. Yes.

Q. Shown by the double line?

A. Yes.

Q. Now, passenger trains move over that line from Duluth down to St. Paul?

A. Yes, they do.

Q. And passenger trains move over that other main line track, that track that goes over Rices Point, from Minnesota, by the Northern Pacific bridge to Superior?

A. They do.

27 Q. Inside of that, the Northern Pacific has this track shown on the left-hand side of this blackboard sketch, over which it moves its freight trains, doesn't it?

A. Yes.

Q. This movement here, is what is known in railroad circles as an inside movement, isn't it?

A. I wouldn't say an inside movement—a transfer movement.

Q. Does the Northern Pacific move a single passenger train over that piece of track [piece of track] down there, between the furnace yard and Rices Point yard?

A. Not to my knowledge.

Q. You know there aren't any, don't you?

A. I have never seen any.

Q. You have been around here every day—from day to day, for some years?

A. Something over five years.

Q. Does the Northern Pacific run any through freight trains?

A. Through to the Zenith and beyond, to these other points in West Duluth.

Q. Are they called through freight?

A. I guess so.

Q. What is a through freight train?

A. There might be different terms used for that.

Q. Now, in your experience of twenty years on the railroad, what is a through freight train?

A. It might be at one yard and go through without breaking up to another yard, at some point distant.

Q. Now, the definition you have given, does not that mean moving from one point to another—doesn't every man, woman and child that knows anything, know that a through freight train is one that is moved from one terminal to another?

A. Well, I wouldn't say terminal, because as I understand it there is a difference in terminals.

Q. What is a local freight train?

A. A local freight train may run over the same track, destined to the same terminal as the through freight train, but stops at different places between to do work.

Q. And the through freight train differs from the local freight train in that it goes through without doing local station work?

A. Yes.

Q. In using freight trains in that way, does the Northern Pacific move any through freight trains over that line?

A. I think these transfers were through freight trains over the line referred to.

Q. You know perfectly well they were not as that term is generally used.

A. Well, I don't understand that distance makes any difference between terminals.

28 Q. Do you call a transfer yard a terminal?

A. Yes, in a way.

Q. What way?

.. It is a terminal delivery point.

Q. A subyard?

A. No, a terminal, as much as Rices Point, in the meaning that these two trains moved from one to another—to the other.

Q. A part of the same terminal?

A. I would call it a part of the Duluth switching system.

Q. Do you mean a through freight train, a train moving from one part of the switching system to another part of that same switching system?

A. Yes.

Q. Do you know whether anybody else uses the expression in the way?

A. Yes.

Q. Did you, during your twenty years railroading?

A. Yes.

Q. And you would always call a train, operating from one part of the switching system to another part of that same switching system, a local freight?

A. Yes, that is possible.

Q. Did you ever hear anybody say that?

A. Yes.

Q. Will you define a local freight train?

Mr. WALTERS. Objected to.

The COURT. I think you may go on. I have already got a good deal of help.

The WITNESS. A local freight, as generally understood, is one running between two terminals, doing station work.

By Mr. LYONS:

Q. I believe we won't disagree as to what constitutes a passenger train?

A. I hope not.

Q. Does any railway move a single passenger train on that piece of track that is involved in this law suit?

A. I don't think they do.

Q. Does any freight train move from Duluth, going up to a point beyond Duluth, move over that piece of track?

A. I could say as to that positively. There may be times when trains run out over that track and beyond.

Q. But you never saw one?

A. No, I have not.

Q. That set of tracks there, is used as a switching set of tracks, is it not?

A. At times.

Q. Always, is it not?

A. I didn't say always.

Mr. WALTERS. Objected to.

Mr. LYONS. Question withdrawn.

Q. What kind of industries are located in there?

A. Coal docks, ore docks, lumber docks, mills—sawmills.

Q. The Carbolite Company's foundry?

A. That is further out; that is not served by the Northern Pacific.
Q. Isn't their building by that particular track?

A. The Carbolite works is out a short distance, going into this business district—I don't believe—

Q. How do you get to the Carbolite Company before you come to the N. P.?

A. There may be a track going to the Carbolite—I don't know positively of anything that can get in there from Duluth from the west.

Q. Are there residences there, or is it a purely business district?

A. Well, there are no residences close.

Q. I mean along the bay front; right on the other side, near the siding.

A. I don't think there are any.

Q. It is a business district, is it not?

A. Yes.

Q. Would trains of the Northern Pacific Railway, coming from a distance—coming up from Duluth—go into Rices Point yard?

A. Yes.

Q. And what is done with these trains that come in there at that point?

A. I believe they are usually broken up—the cars shunted to different track for their disposition.

Q. All trains going in to Rices Point are broken up, and the cars are sent down past these various industries there, sent down by a switch engine, aren't they?

A. Yes.

Q. Suppose a train is being made up to leave Duluth to go to St. Paul, or to somewhere distant, where do these trains go from?

A. Freight trains?

Q. Yes.

A. Out of Rices Point yard, most of them. I think most of the merchandise freight is made up at the freight house at Fifth Avenue.

Q. That has nothing to do with this district?

A. No.

Q. These trains are made up at that particular point, shown on the left hand of that map or the blackboard sketch, Rices Point yard?

A. Yes.

Q. That would be what you would call a classifying yard?

A. Yes.

Q. These two trains you speak of, or transfers, as you call them, were they moved by a switch engine?

A. Yes.

Q. Not by a road engine?

A. There is no difference except in the matter of safety-appliance equipment.

Q. No difference between that and a road engine?

A. Not in the generally accepted term.

The COURT. There is a difference also in that a switch engine has no cowcatcher.

The WITNESS. The only difference is in the matter of safety appliances, and the cowcatcher—there is a footboard on the front of the engine usually—the switch engine.

By Mr. LYONS:

Q. And you followed one of these trains—the transfer, as you describe it—this train you saw the first day—the 21st of September—was that the train of cars that moved from the furnace to Rices Point?

A. Yes; that first one was on the 21st of September.

Q. Which way did that go?

A. West, leaving Rices Point to go to the furnace yard.

Q. Is that the one you rode on?

A. No; that is the one I didn't ride on.

Q. Which was the one you rode?

A. That was on the 22nd.

Q. Where did that move from?

[—] From the furnace yard to Rices Point.

The COURT. Now, what is the furnace yard?

The WITNESS. A system of tracks in the vicinity of the Zenith Furnace Company's plant in West Duluth.

By Mr. LYONS:

Q. West Duluth is a part of Duluth—all one city?

A. I believe it is; I understand that it is.

The COURT. It is.

By Mr. LYONS:

Q. What were these cars; loaded or empties?

A. Some loaded and some empty.

Q. Most of them were loaded, I suppose?

A. Most of them, I think.

Q. Now, as I understand it, the way this business is done, this transfer assembled or loaded its carts at these various industries around by the furnace yard, and then moved down to Rices Point yard. The movement of loaded cars at the crossing is in that direction?

A. With some transfers, but not with this one in question.

Q. The empties, speaking generally, are picked up—taken out to these docks—to these various industries?

A. Yes.

Q. You rode that particular train on the 22nd down there to the Rices Point yard?

A. Yes.

31 Q. You tell us a great deal about passenger trains, Soo trains, Duluth & South Shore trains, and Duluth and Winnipeg trains—These were trains that were not moved on this track this N. P. track, were they?

A. No, but they cross this track [indicating on sketch].

Q. And some on the other track which crosses the Northern Pacific?

A. Yes.

Q. When you left that day, the train you were on stopped at different places between the furnace yard and Rices Point yard?

A. Yes.

Q. They did all things required under the law?

A. Yes.

Q. Now, you speak of two particular crossings—they were crossings leading over to the south side of this Northern Pacific track, weren't they?

A. Yes.

Q. I suppose there are crossing watchmen there?

A. No, sir.

Q. No crossing watchmen there?

A. No, sir.

Q. I thought I saw one in there?

A. I don't know of their having one after I passed down there—I don't know any.

The COURT. [The Court:] From Rices Point down?

The WITNESS. Yes. I don't think there is anyone between that point and the furnace.

By Mr. LYONS:

Q. Where do these grade crossings lead to?

A. To these mills and industries.

Q. You spoke of a rock cut—that is just a few rocks on one side of the track there?

A. No, it is on both sides of the track—runs through.

Q. A few more on the other side of the track for a very short distance, isn't that true?

A. Well, it is a very high track in there.

Q. What is the fill?

A. I think it is over 100 feet that there are rocks on both sides.

Q. You can see right through that?

A. Right in the cut?

Q. Yes.

A. No, not for any distance.

Q. Through it, meaning the entire distance, Mr. Lenhart? Did you ever ride on an engine through there, and have not been able to see right through to the switch point?

A. I never rode through on an engine.

Q. Did you ever stand there and look over the situation?

A. Yes.

Q. And you can see all along from the furnace yard to Rices Point; as you approach that cut you can look away through to the switch point that is beyond it, can't you?

A. Which switch-point—there are several in there?

Q. There is one that is some distance beyond it, toward Rice Point.

A. Well, there is one almost in, or leading to the crossover.

Q. Did you ever look over it?

A. I don't know that you can see clear over it.

Q. And you can see the entire distance over the rocks on both sides.

A. I don't think you can.

Q. Do you know, have you ever gone ahead and looked over it?

A. I never made a careful observation to see just how far I could see through it or beyond it.

Q. How was this train operated that you were on, was it operated by train orders, by time cards, or by block signals?

A. I don't think they are.

Q. How are they operated?

A. I don't know as to that, I think by yardmaster's directions.

Q. You know that perfectly well?

A. I couldn't swear to that.

Q. How else could you say they could be operated?

A. They might telephone, have some telephone arrangement, but I never saw—

Q. Anyone else ever see such an arrangement?

A. I don't know.

Q. What do you mean by yardmaster's orders?

A. He may issue instructions for a train to leave at such a time and go to such a place, or vice versa.

Q. Don't you know a yardmaster will say "Bill go down to such a point and get that string of cars, and take it to such a place," is that yardmaster's orders?

A. Yes, practically.

Q. And you know a yardmaster's word is law. A train can not cross that track to another place except with yardmaster's orders?

A. That is true, oh yes.

Q. Now, then, no one train has the right of way over any other train.

A. I don't know as to that.

Q. When operated under yardmaster's orders, isn't that true?

A. Generally.

Q. In other words the engineer has got to move under control, is that the expression?

A. Yes.

33 Q. And you say the speed of that train you figured at from three to eighteen miles an hour. Isn't that a pretty wide guess?

A. I don't know, I think they have made that often, especially in coming this way to get up that grade.

Q. Where is the grade?

[Q.] Here at point J, the D. M. & N. tracks. They go down there with fully fifty to 100 cars; there is quite a grade in there.

Q. The work that is done there is in the ordinary way they are accustomed to see work done in switching yards, is it not?

A. Where do you mean in particular?

Q. All along that track, all trains are operated without any written orders or time cards?

A. So far as I know they [—].

Q. Are bills of lading issued along that line of track?

Mr. WALTERS. Objected to as immaterial.

The COURT. Answer the question.

Mr. WALTERS. Exception.

The WITNESS. I can't say.

Mr. WALTERS. We will admit they issued no bills of lading.

By Mr. LYONS:

Q. On this particular day that you rode this train, were any cars set out from the train that you rode, between the furnace yard and Rices Point?

A. No, sir.

Q. You know, do you not, from your experience around these [these] yards, that if there are cars to be picked up and there was a car to be set out, that this is done by these trains which you call transfers?

A. I presume by some of them, but I don't know which ones.

Q. This particular one they didn't?

A. No.

The COURT. Did they stop at any of the crossings?

The WITNESS. Yes, at the Soo Line, at the D. W. & P. crossing, at the Missabe crossing—H and I; the points marked C and D, and at G, H, and L.

The COURT. Stopped at these?

The WITNESS. Yes, your honor.

The COURT. On all of them?

The WITNESS. Yes, sir.

34 By Mr. LYONS:

Q. Now, the usual practice there, as you have observed it, that is from the furnace down to Rices Point, is to include these various movements you have treated as one yard?

A. What do you mean—do you mean designated as a yard?

Q. I mean to say in that way they are operated, if you please, only as one set of switch tracks.

A. It is operated as a lead switch track, that is to include parts of yards.

The COURT. It does include a part of a yard.

The WITNESS. In this class it actually includes part.

By Mr. LYONS:

Q. Take any yard on any railroad, it will [be] have various districts, will it not?

A. Not every yard.

Q. Any big yard. We are talking about big systems now.

A. Then you are talking about big switching districts.

Q. This is a big district, isn't it?

A. Yes, quite large.

Q. Isn't this considered one of the biggest terminals in the country—at least in the Northwest?

A. Yes, not in the country.

Q. And you say it is operated as one switching district?

A. Yes.

Q. That Duluth, Missabe & Northern Railway has its own ore docks there, of course?

A. Yes.

Q. Very extensive ore docks?

A. Yes.

Q. And to get at or out of these ore docks there is an overhead crossing?

A. Yes.

Q. Since they have started a steel plant down there, they have had occasion to go into the coal docks to get coal and take it out to the steel plant.

A. Yes. But the coal docks are supplied from the ore docks. It is a different movement.

Q. Since they have started a steel plant, the D. M. & N. have had occasion to go into the coal docks and get coal there.

A. Yes.

Q. And to get to these it can't use these overhead tracks at all, can it?

A. They don't use these.

Q. And they can not use them?

A. Not to get coal.

Q. That movement of coal cars you say is about twenty-three to twenty-five?

A. I think about twenty-three cars going west.

Q. About twenty-three cars, loaded with coal or loaded with lumber loaded at the dock, didn't they?

A. These ordinary freight trains, and these log trains.

35 Q. Moved out over this particular track, leading into this whole situation?

A. Yes.

Q. Now, these trains that moved that way, they moved without orders, didn't they. I am talking about the D. M. & N.?

A. I don't know what method they used for moving. I think they handled these without orders.

[—] The same with switching a train—these transfers there that you have described—is that the way?

A. I don't know.

Q. So far as you do know, isn't that a fact?

A. I don't know.

Q. You say they coupled up the air in these?

A. Yes.

Q. Coupled with it as soon as their train moved, as soon as they got beyond the yard, out on the main line of the Northern Pacific, didn't they?

A. I don't think they do until they get possibly a mile or so further west from the furnace yard.

Q. You don't know how far after you got beyond the furnace—somewhere you think on the Northern Pacific, the main line?

A. I don't know. That would be a guess. They had reached that line.

Q. They moved out upon the main line of the Northern Pacific sometime after leaving the furnace, some distance?

A. Yes.

Q. These D. M. & N. trains you speak of, they pick up cars sometimes, don't they, after they leave this coal dock?

A. Not that I know of.

Q. You don't know that they do not?

A. No, I don't know that they do or not. I never saw them pick up any or set out any.

Q. How about the Duluth & Iron Range trains you spoke of. They use a certain portion of this track over which the transfer in question moved, don't they?

A. Yes.

Q. From where and to where?

A. Down to the Boston yard, marked in there [indicating on blackboard sketch].

Q. I think you said they got over on one of these switch tracks?

A. Yes; they go by the Northern Pacific there some way.

Q. I am talking about the extent to which they used that track—the transfer particularly that you rode on.

A. They used down from that point marked A, down to somewhere there where the track branches off.

Q. Under the line of the Northern Pacific railway?

A. Yes.

Q. The only use they make of that portion is to run occasional log trains to the Alger-Smith mill?

A. Yes. Used it every day for log traffic.

Q. Is there more than one train a day?

A. I couldn't say how many.

Q. But they averaged one log train a day, based upon your observation?

A. I never took the time to go in there to see. Never checked it up.

Redirect examination of Allen W. Lenhart by Mr. WALTERS:

Q. You said that is a main line from point A, down to the Rices Point yard?

A. Yes.

Q. Why do you call that a main line?

A. Because the traffic is moved between those two points then through, without breaking up trains on them.

Q. How about the line up there on that track; is it a line similar to any other main line of railroad?

A. Why, it is good condition.

Q. Is it lined up in reference to switches in the same manner as a main line is?

A. Yes.

Q. Explain what you mean by that.

A. The switches for tracks have leads on them, and the switches indicated by different colors are thrown by electricity, and some of the switches there are locked—switch-locks.

Q. Then when you say switch-locks, you mean that the switches are so arranged that trains or transfers, when passing will not in any way be shifted onto any of the side-tracks?

A. No.

Q. And, as you say, what the word means is "keyed," or lined up?

A. Yes.

[A.] How are they used within a purely switching district, with reference to these switches?

A. The tracks are usually left just as they are used.

Q. You stated a while ago that this is one switching district. How are the cars from these various industries picked up and moved over to distant yards, such as the furnace yard and Rices Point yards?

A. Well, they are assembled at these industries in the vicinity of the yard. The cars are assembled after that in the furnace yard until they have the transfers all coupled together and moved down to Rices Point yard.

Q. Is the same true with reference to the condition down in Rices Point yard?

A. It is.

37 Q. What kind of work is done in order to get these cars from the various industries between the furnace yard and Rices Point yard?

A. It would be necessary for an engine to go into these industrial plants to get these cars from them, going onto this main track, bring the empties, and take them into Rices Point yard.

Q. Is the character of that kind of work different from the character of the work that was transacted in the movement of this transfer from Rices Point to the furnace yard, Mr. Lenhart?

A. Well, the engine picked up these cars at these industries—would go from one to the other, pick up cars, some here and some there, take them along to this transfer, go from the furnace yard to Rices Point, gather up all the cars at the furnace yard, or a part of them, bringing up the train afterward between Rices Point and the furnace.

Q. You stated a while ago that when cars are working in a switching yard in a main-line movement, the air is required to be coupled up; why is that?

A. In a switching movement, or short movement, the cars are only assembled when in the yard and on another track a short distance.

Q. How much, then, in this transfer movement or a transfer of the kind described, from Rices Point to the furnace yard and vicinity, would be the necessity for public safety to couple up the air in this case?

A. Usually because they have a larger number of cars and the weight is greater and it would be harder to stop when they are started at crossings at grade—street crossings. All these things occur.

Q. Is it more necessary to get complete control of the engine because of the condition of a movement, [like] the movement that you have described?

A. Yes.

Q. What about the danger of a train breaking in two when the air is not coupled up?

A. Well, there is considerable danger, because if they are not coupled up with the air there is no way of controlling the part that is broken, except by hand brakes, and that it might not be noticed by the train men for some time.

Q. That is when the air is not coupled?

A. Yes; there might be a break and the two parts run together, causing damage, and injury to employees.

Q. Is there danger of leaving a portion of the train on the track without knowledge of the engineer, when the air is not used?

A. Yes; there is.

28 Q. How soon is it noticed when the air is in use and the train breaks in two?

A. That is, in case of an accident [occurring], the safety hose supplying the air causes the brakes to set automatically and causes the train that breaks in two to stop in a short distance.

Q. Does it stop both sections of the train?

A. Yes.

Q. Stops it automatically?

A. Yes.

Q. Overcomes the possibility of danger?

A. Yes.

Q. Does the engine stop, too?

A. Stops suddenly; both portions.

Q. When the air is being used the engineer then can with greater certainty stop his train under better control in a shorter time?

A. Well, for that matter his train is stopped automatically. He doesn't need to stop.

Q. That is where there is a break in two?

A. Yes.

Q. And where there is no air?

A. In that case, as soon as he becomes aware of it, he would have to use caution, or the rear portion of this train might run into the head portion and cause damage.

Q. In case there is no break, when a transfer is moving down the track at a speed of from 15 to 18 miles an hour, how is it, as a matter of safety, when the air is being used in the matter of stopping the train?

A. Sure, he can stop in a short distance at that speed.

Q. Do you know of any conditions—did they exist on this day between Rices Point and the furnace yard—that did not warrant the use of the air brakes as a matter of safety?

A. Any condition that did not warrant it?

Q. Yes.

[Q.]. No; I don't know of any.

Q. Are there any conditions that arise in the matter of switching that obviates the necessity of calling for the use of the air brakes?

A. As to the supply of air that is used, that has to be governed by the law.

Q. You speak of a train starting from Rices Point to the Pacific coast, leaving Duluth; what is the first station after you leave West Duluth, on the Northern Pacific, if you know?

A. I don't know; that would depend upon what route you take. Sometimes you go across Grassy Point and over the bridge to Superior.

Q. Is Superior the first station after you leave Duluth, going around by Superior?

A. West Duluth station and then Superior.

Q. Is there any more necessity, so far as the matter of safety 39 is concerned, to be coupled to the air between West Duluth and Superior than between Rices Point and the furnace yard?

Mr. LYONS. Mr. Lyons—objected to as immaterial.

The COURT. The objection is overruled.

Mr. LYONS. Exception.

The WITNESS. I don't think there is any difference.

By Mr. WALTERS:

Q. Is there any difference that you know of?

A. Not that I know of.

Q. Are there any more railroad crossings at grade in more danger incident to railroading, between Rices Point and the furnace yard, than there is between West Duluth and Superior?

A. Yes, not so many railroad crossings between West Duluth and Superior as there are between Rices Point and the furnace yard?

A. There is still more necessity between Rices Point and the furnace yard in West Duluth than there is between Duluth and Superior from that point of view.

Q. What would you say about the necessity for using the air in that congested district?

A. I would say it would be very necessary as a matter of safety.

Q. With reference to this train drawn by engine No. 82, when did you consider that the switching was done?

A. In which movement, going west or going east?

Q. Going from the furnace to Rices Point yard.

A. I considered the switching was done after we shifted onto track 3, on the road going east.

Q. That was when the switching on that transfer was done?

A. Yes.

Q. Then, when was the next switching done with respect to that?

A. After it arrived at Rices Point yard.

Q. You speak of these D. M. & N. trains arriving on the main line of the Northern Pacific about two miles out of the yard—I think you said west of the furnace yard—what do you mean by that, “arrived on the main line?”

A. When we reach the point in the clear out there, I think they go out on the main line of the Northern Pacific, indicated here [indicating blackboard] by this double white line.

Q. You mean between Duluth and what?

A. Saint Paul.

Q. You don't mean to indicate by that that it was a different class main line from that that exists between the furnace yard and Rices Point yard?

40 A. No, I don't see how it would be in a different class.

Q. And you would call that a main line, too?

A. They are both main lines.

Q. Why do you refer to that line at a point two miles west from the furnace as being a main line when you refer to this D. M. & N. train moving over that until it reached the main line?

A. It is only spoken of as a main line as distinguished from the industrial tracks along there.

Q. Is this a different main line for the D. M. & N., between the coal docks and stone dock, to the steel plant?

A. Yes, so I understand it. I understand it is considered a main line.

Q. It is the only line?

A. It is the only line they use.

Q. And the same is true with reference to the Duluth & Iron Range?

A. Yes, that part that they use.

Q. It is the only line they can use, is it not?

A. Yes, sir.

Q. You speak about the Duluth & South Shore trains using a portion of this main line from point A down to that side track that is used by the D. & I. R. That is not the only portion of the main line that is used by the Duluth & Iron Range?

A. No, sir. They used the entire track after bringing the empties at the Alger-Smith plant to East Duluth, at Rices Point.

Q. You mean went over the main line used by the D. & I. R. for operating loaded trains?

A. Yes.

Q. You refer to that portion of the main line used by the Duluth & Iron Range down at point A, at that side track, as being a portion

of the main line used by the D. & L. R. Did you not mean the portion used for the loaded cars?

A. Yes.

Q. In other words, the other portion of the main line that *was* used by the Duluth & Iron Range was used by the empties—trains of empty cars—is that true?

A. Yes.

Q. Coming from or leaving—making a start, going in and coming out there.

Recross-examination of Allen H. Lenhart, by Mr. LYONS:

Q. The reason you speak of the Duluth & Iron Range using the main line of the Northern Pacific when it was beyond the furnace yard was that you were then thinking of a main line as the word "main line" is ordinarily used by our people here?

A. [Q.] No, I think I used the term in order to distinguish it from one of these freight tracks.

41 Q. To distinguish it from what?

A. If I simply said Northern Pacific tracks you wouldn't know what I meant.

Q. If I said "main line," everybody in Duluth would know what I meant, isn't that true?

A. I don't know whether they would or not.

Q. And you say you can't see any difference between a movement from Duluth here, to Superior, to a movement from the furnace yard down to Rices Point—you can't see any difference?

A. Not any whatever in regard to using air brakes.

Q. In one case there are passenger trains moving over them?

A. There are passenger trains crossing this one in the other case.

Q. You mean going from Duluth to Superior?

A. Yes.

Q. There are freight trains?

A. Yes.

Q. Local freight trains?

A. Yes.

Q. And in the other case you have this track, this line down here, from the furnace yard down to Rices Point yard, to these industries on the bay front?

A. Yes.

Q. And they are the only trains that cross from the furnace yard to Rices Point, and you consider that the switching is completed when the work is done at the Rices Point yard?

A. For that transfer movement, yes.

Q. And there is no classification, no waybill, no bill of lading, and from the fact that the trains have to be made up later in Rices Point yard, you consider that the switching would be completed when they leave the furnace yard?

A. Yes.

Q. That would likewise be true in regard to that string of cars, when that string of cars was picked up in the Boston yard?

Mr. WALTERS. Objected to. We are discussing a movement to the furnace yard.

Mr. LYONS. This man advances ideas never heard of in railroad circles. I simply want to show that string of cars was taken from the Boston yard to the Rices Point yard.

The COURT. The witness may answer the question.

The WITNESS. I can not answer that question because I don't know what cars would be in that train.

By Mr. LYONS:

Q. Assuming there is nothing between the Boston dock and Rices Point yard and a string of cars, crossing from the Boston yard, moves down to the Rices Point yard, or moves to the furnace yard—what would you call that?

42 A. I would call it a through movement.

Q. You mean if there was a string of cars taken from the Boston yard, moved down to the furnace yard, you would say the switching was done before they left that yard?

A. Yes.

Redirect examination of Allen H. Lenhart, by Mr. WALTERS:

Q. You said something about what determines a main line, just describe that.

A. I don't understand.

Q. What is your definition of the word main line?

A. A direct line between two stations.

Q. What do you mean by stations?

A. A station is a place where work may be done.

Q. You don't necessarily mean depot?

A. No, sir. There may be no depot there.

Q. Is not that the rule that is noted in the Northern Pacific Railway Company's book of rules?

A. As I recollect it, it is something like that.

Recross-examination of Allen H. Lenhart, by Mr. LYONS:

Q. The definition of main line in the Northern Pacific Railroad Company's book of rules would be this: (reading from book) "A track extending through yards and between stations, upon which trains are operated by time-table or train order, or the use of which is controlled by block signals?"

A. That is their rule.

Redirect examination of Allen H. Lenhart, by Mr. WALTERS:

Q. I believe that this book of rules states that a main track is (reading from book) "a track extending through yards and between stations, upon which trains are operated by time-table or train order, or the use of which is controlled by block signals." What is the definition of station?

A. (Witness reads), "A place designated on the time-table by name, at which a train may stop for traffic; or to enter or leave the main track; or from which fixed signals are operated."

Q. What do you mean by fixed signals?

A. A fixed signal is a signal of fixed location indicating a condition affecting the movement of a train.

43 Q. Have you the rule there?

A. Yes.

Q. Read it.

A. (reading from book.) "Fixed Signal—A signal of fixed location indicating a condition affecting the movement of a train. Note to definition of fixed signal.—The definition of a fixed signal covers such signals as slow boards, stop boards, yard limits, switch, train order, block interlocking semaphore, disc, ball or other means for indicating stop, caution or proceed."

Q. Are there switches along this main line you have described?

A. Yes, there are.

Q. According to their own rule what is there in connection with this switch line or track that take it out of the class of being a main line?

A. I don't know of anything.

Q. According to their own rule about being under the control of the yardmaster?

A. He may direct trains on the main line anywhere.

Q. And according to their own rule what about a main line which could be under the control of the dispatcher—isn't that true?

A. Not necessarily, in all cases.

Q. What are the conditions, then, under their own rule, that take away from this the character of being a main line, following their own rule, as the definition states here, that takes it out of the class of a main line?

A. Not any.

Q. Well, they are not operated under a time-table, are they?

A. No.

Q. Well, that is one thing, is it not?

A. Yes.

Q. They are not operated under train orders?

A. Not that I know of.

Q. What, if anything, is their under their own rule that takes it out of the class of being a main line—is there anything else?

A. Well, they have no block signals.

Q. These are the three things that, under their own rules, the defendant company's book of rules, that prevent this from being a main line, isn't that true?

Recross-examination of Allen H. Lenhart by Mr. LYONS:

Q. Now, this rule, which you read at counsel's request from the Northern Pacific book of rules, is that a station is a place designated on the time-table?

A. Yes, that is right, a place designated on the time-table.

Q. You have no information that this station, known as the Berwind yard is designated on the time-table—or the Boston yard, or the furnace yard?

A. I don't think they are.

44 By Mr. WALTERS:

Q. Now, this rule says they are places at which work is done, designated on the time-table, under this rule which you read at counsel's request?

A. Yes.

Q. This rule also provides that it is a place where work is done.

A. (No answer.)

Mr. LYONS. It has to be both "or."

The WITNESS. I understand it didn't say "or," I didn't understand it that way.

By Mr. WALTERS:

Q. Just read it again.

A. (witness reads from book): "A place designated on the time-table by name, at which a train may stop for traffic, or to enter or leave the main track, or from which fixed signals are operated."

Q. Are there any of these places at which fixed signals are operated?"

A. They are operated at these railway crossings.

The COURT. On the switches too?

Mr. LYONS. Do you call a switch a fixed signal?

The WITNESS. Yes sir.

Witness excused.

Howard M. Burtch, called as a witness in behalf of the Government, and being first duly sworn, testified as follows, to wit:

Examination in chief by Mr. WALTERS:

Q. What is your business, Mr. Burtch?

A. Inspector of safety appliances, Interstate Commerce Commission.

Q. Were you a resident of Duluth on the 21st of September, 1916?

A. I was.

Q. Did you make inspection of the transfer testified to by Mr. Lenhart, under the same inspection, regarding the condition of the air brakes?

A. Yes.

Q. Did you accompany these two transfers about which he testified?

A. The transfer on September 21 we didn't follow, which left Rices Point with 40 cars; we didn't accompany that, but on September 22, engine No. 82, with 40 cars left the furnace yard from Rices

Point at 10.55, we rode that train.

45 Q. You heard Mr. Lenhart testify as to the manner in which the air brakes were connected up in this transfer, did you?

A. Yes. The transfer on September 21 had no air coupled up, that of the 22nd, there was ten cars—between the 10th and the eleventh, the air was coupled up.

Q. Are you familiar with the operation of the log trains by the Dulul & Iron Range, over this line of track between Rices Point and the furnace yard?

A. No, I am not. I have seen it take only trains of empties down there.

Q. Do you remember whether they had air-brakes coupled up on that?

A. They did.

Q. (By Mr. Walters to the court.) I neglected to ask Mr. Lenhart whether the air was coupled up on these trains. Can I ask him at this time?

The COURT. Yes.

Mr. LENHART (the witness). They always have on any logging train that I have seen.

Witness excused.

W. H. Strachan, called as a witness in behalf of the Government, and being first duly sworn, testified as follows, to wit:

Examination in chief by Mr. WALTERS:

Q. Mr. Strachan, what is your business?

A. Superintendent of the Northern Pacific Railway, Lake Superior division.

Q. You are in charge of the system of tracks in and about Duluth about which Mr. Lenhart and Mr. Burtch have been testifying this morning?

A. Yes.

Q. Have you the consist of Northern Pacific transfer drawn by engine No. 82, 40 cars, on September 21, 1916?

A. Yes.

Q. What do you mean by "consist?"

A. Well, it shows what the car is, and in some cases the [commodities]—contents of the cars, and in some cases the destination of the train.

Mr. WALTERS. I believe that I may state that it is agreed to by the defendant company that the line of railway over which this transfer moved is an interstate line, moving in interstate commerce.

46 Mr. LYONS. We will admit that without looking it up.

By Mr. WALTERS:

Q. How many cars were in that transfer on September 21?

A. (Witness looks at papers.) Sixty-one cars.

Q. Do you mean there were 61 cars there for Rices Point?

A. Yes.

The COURT. These two gentlemen here have testified that there were forty-eight cars.

The WITNESS. I have a list which shows [fifty-six], and five-sixty-one cars.

The COURT. Well, did they all come out of Rices Point, or were some of them picked up at other places?

The WITNESS. These all went out at Rices Point yard.

By Mr. WALTERS:

Q. What time of day did they leave?

A. This check shows one o'clock.

Q. And where does it appear on this list which you are consulting—were they all picked up at Rices Point yard?

A. Yes; checked back on that track in Rices Point here before the departure of the train.

Q. Where is there something that shows that all these cars were hauled out of Rices Point yard?

A. (Witness hands paper.) There is your list.

Q. Is there anything on that that indicates that all these cars were hauled away from Rices Point yard?

A. Nothing to show what didn't go.

The COURT. As I understand it, these fifty-six cars were on one of the switch tracks at Rices Point yard?

The WITNESS. Yes, sir.

The COURT. Is it not possible that some of them were taken from that track out of the forty-eight cars taken out on that general track that runs down to this yard?

The WITNESS. It is possible, but not probable.

The COURT. It might have been done?

The WITNESS. Oh, yes.

The COURT. You would not say these gentlemen were not right in saying forty-eight cars were moved or moving from Rices Point yard or to the furnace yard?

The WITNESS. Oh, no.

47 By Mr. WALTERS:

Q. Can you see from your list on which days there were 48 cars?

A. No, I cannot.

Q. Now, can you see if any of these cars were set out between Rices Point yard and the furnace?

A. As to whether they had the 48 cars, I cannot.

Q. With regard to the transfer of September 22, do you know how many cars were in that transfer?

A. Forty.

Q. Do you know, whether or not, that is the number of cars that left the furnace yard?

A. No, I do not. I know forty of them arrived at Rices Point yard.

Q. You know forty of them arrived at Rices Point yard?

A. Yes.

Q. And forty of them left the furnace yard?

A. I don't know.

Q. Have you there a notation showing the destination of those cars that arrived at Rices Point yard?

A. Why, I think there are one or two cases that shows to the line, that is true of the majority of them, that switch cars, on which the empties were going to Rices Point, or other places, except at those various industries out there for loading before returned to Rices Point yard, and were delivered to the various connections.

Q. Have you this other train of cars in this transfer that were destined to points between Rices Point and the Furnace yard?—that is their final destination for loading was at points between Rices Point and the furnace yard?

A. That I cannot say.

Q. Do I understand you to say that some of these were taken back to those points for delivery to connecting points?

A. For delivery to connecting lines, take, for instance, that first car on the list was delivered to the Omaha.

Q. Where was that delivered?

A. At the track assigned to them, on Rices Point yard.

Q. The next one?

A. The next two for the Duluth & Iron Range.

Q. Where was that delivered?

A. Fifth Avenue yard.

Q. And the next.

A. Two for Minneapolis, via our line.

Q. Delivered where?

A. Hauled to Minneapolis, over our line.

Q. And the next car?

A. Pig iron for Dock No. 2.

Q. Where is dock No. 2?

A. Dock No. 2 is in Rices Point yard, that part of Rices Point yard known as the east side yard.

48 Q. I will ask you with regard to all these, are any of these cars here for delivery by your road to points between Rices Point and the furnace yard, on the line of the Duluth Terminal?

A. On this line between Rices Point and the furnace yard.

The COURT. Do you call that the Duluth Terminal?

The WITNESS. Yes.

The COURT. The old terminal line?

The WITNESS. Yes.

(Last question repeated.) I will ask you with regard to all these, were any of these cars here for delivery by your road to points between Rices Point and the furnace yard, on the line of the Duluth Terminal?

A. I didn't see any.

The COURT. Is what you are trying to get at that some of these cars were to be brought down from that furnace yard, and then taken to Rices Point yard to some of these industries between the two points?

The WITNESS. Not to any industries.

By Mr. WALTERS:

Q. Now, where have you cars for the Duluth, Missabe & Northern Railway, of which you made delivery at Twenty-seventh Avenue West?

The COURT. That is, between these two points?

The WITNESS. Yes, but delivery is usually made over another line which would not be a direct delivery over the Duluth Terminal.

The COURT. How would it be delivered?

The WITNESS. Brought to Rices Point, and there classified on the track that we have set aside for the Missabe delivery, and then taken out over train line to the Missabe at Twenty-seventh Avenue West.

The COURT. On which track does it take it?

The WITNESS. We let them use the same Y that we use out of Rices Point yard.

The COURT. Taken out on the double track?

The WITNESS. It is a separate track used for that purpose.

49 By MR. WALTERS:

Q. Show us on the map.

(Witness indicates by marking a line on map.)

By MR. WALTERS:

Q. Delivered over at this point, is it?

A. Yes.

Q. How far from Rices Point is that?

A. About 2,000 feet.

Q. Here is the D. M. & N., right here; is that the yard you refer to?

A. No.

Q. There is another yard north of the N. P. double track down there?

A. Yes.

Q. This car was delivered up there?

A. Yes.

Q. Are there any other cars there that they have delivered to connecting lines?

A. Some to the Great Northern.

Q. Where would they be delivered?

A. At Rices Point yard.

Q. Some to the Soo line?

A. Yes.

Q. Where delivered?

A. Rices Point, some to the furnace yard, and some to the Duluth, Winnipeg & Pacific.

Q. Where were they delivered?

A. Rices Point yard.

Q. What about D. & L. R. 5056?

A. It would be delivered at Fifth Avenue.

Q. Mr. Strachan, do you know how many of these transfers at this time were operated each day over your line?

A. No; I do not.

Q. Do you have an idea, approximately?

A. Two or three, perhaps.

Q. From each direction?

A. Yes.

Q. Are they operated over any particular time of the day?

A. No.

Q. Some at night?

A. No; I think not; I don't think there is any set time. I am not entirely familiar with just how the details are worked out there.

Q. What was the longest train you have operated in that manner that you have operated these transfers?

A. I don't know.

Q. Did you operate any of them with more than forty-eight cars?

A. Yes.

Q. How much more?

A. I wouldn't undertake to say.

Q. Do you operate any with 100 cars?

A. I guess so.

Q. Was the air coupled up on these?

A. No.

50 Q. Are you familiar with the number of trains operated by the D. M. & N. over the line that is described by Mr. Lenhart?

A. No; I am not.

Q. Are you familiar with the number of trains operated by the Duluth & Iron Range Railway over this particular line?

A. Why, I think they would average about one a day; probably five a week, sometimes more, but right along I think it is four or five a week, I believe, or such a matter.

At this point in the trial an adjournment was had to 2 o'clock p. m.

PROCEEDINGS OF AFTERNOON SESSION, 2 O'CLOCK.

Direct examination of W. H. Strachan continued.

By Mr. WALTEES:

Q. That transfer moved from the furnace yard—between Rices Point and the furnace yard. Do I understand you to say there were some cars for delivery to the D. M. & N.?

A. I think it showed two.

Q. I believe you stated they were first taken to Rices Point and then hauled back to the D. M. & N. around on the north side of the double track of the Northern Pacific?

A. Yes.

Q. Why weren't these cars delivered to the D. M. & N. here at the intersection of the D. M. & N. line; that is this line traversed by the transfer in question at the point near G?

A. The D. M. & N. will not accept cars there, that kind of a car.

Q. Why is that?

A. Because it goes by a different route, and this was not for the steel plant. The only business they accept at that point is cars destined for the steel plant.

Q. But it could have been delivered to the D. M. & N. at that point?

A. No; it could not, because the D. M. & N. would not accept it.

Q. Do you mean to say it would be left on the D. M. & N. track east?

A. No; we can't block any other company's track without their permission.

Q. It would have caused a great deal of delay, would it not, if you had to switch the cars out to this point—delay your transfers on getting up, wouldn't it, at point G?

A. It might; yes. Before I go any further, I made an error. I see there are not any in there for the D. M. & N. I think I had the the wrong list.

51 Q. You say there were none in there for the D. M. & N.?

A. Yes.

Witness excused.

William A. McWatty, called as a witness on behalf of the Government, and being first duly sworn, testified as follows, to wit:

Examination in chief by Mr. WALTERS:

Q. What is your business, Mr. McWatty?

A. Deck agent for the Duluth, Missabe & Northern Railroad.

Q. Where is your place of business?

A. Right between the coal dock and mill, behind the limestone dock.

Q. By means of the blackboard sketch there can you show to the court and jury just about where your place of business is?

A. (Witness indicates on blackboard.) My office is right here, by H.

Q. On the north side of the track?

A. Yes.

Q. What are your duties?

A. I have charge of the transportation part of the business at the dock, have charge of seven engines, and trains of cars.

Q. What is your destination?

A. I have charge of engines from Mesaba junction to the steel plant.

Q. What is your title?

A. Deck agent.

Q. You have charge of how many engines?

A. Seven.

Q. You are employed by the Duluth, Missabe & Northern Railway?

A. Yes.

Q. Do you know how many engines you operated over this line of track between the furnace yard and your office, during the month of September, last year?

A. I couldn't tell you exactly, I have a record of it.

Q. Just give it to me approximately.

A. (Witness reads from paper.) September, 1916, five or six trips days, and four or five trips nights, but not every night.

Q. Do you mean five or six trips in each direction?
A. I mean to the steel plant from our limestone and coal dock.
Q. You mean round trips to the steel plant?
A. Yes.
Q. What do you take to the steel plant?
A. We take coal and limestone, ore, scrap iron, and some merchandise.

52 Q. And you received all that traffic down to what is known as the D. M. & N. coal dock?

A. I received the coal from the coal dock, and lime from the limestone dock, that is somewhere across here [indicating on blackboard] from Missabe junction—received that there.

Q. Where is Missabe junction?
A. (Witness goes to blackboard and indicates.) Just about here.
Q. Here, north of the double track of the Northern Pacific?
A. Yes.

Q. Do you cross that double track of the Northern Pacific—where, at right angles?

A. We don't cross it, we go on it.
Q. Do you go on it at right angles?
A. It is on a kind of a slant, about 40 degrees, I guess.

Q. Where is the limestone dock with respect to the coal dock—is it near the coal dock?

A. (Indicating on blackboard.) This should be the limestone dock, situated here, and this the lumber dock, east of the [the] limestone dock.

Q. And these docks are approximately close to each other, are they?

A. Yes.
Q. And most of that traffic from that neighborhood down there is from the coal and limestone docks, is it?

A. Nothing to the steel plant from the lumber dock.
Q. Nothing from the lumber dock to the steel plant?
A. We received from Proctor mostly lumber, and the steel plant only received coal from our coal dock.

Q. Where did you load that lumber that was hauled from that point?

A. Here, at Proctor—loaded it down at Missabe junction, shipped it from there to the lumber dock, and loaded it on the boats.

Q. Delivered down there?
A. Yes; loaded it on the boats.
Q. Is there any traffic that you deliver to these points other than lumber?

A. On the lumber docks?
Q. That you deliver there at the coal docks, at the ore docks, or at the lumber docks; is there any other kind of traffic you delivered than lumber?

A. I am loading ties there to-day.
Q. There is lumber and timber?

A. Yes; forest products.

Q. Is there any other way of getting out and into this section down there other than over this line of track that you have described?

A. No, sir.

Q. And that was the line that you were using at that time for these trains?

A. Yes.

Q. What is the tonnage of these trains?

Q. A. In the neighborhood of 1,700 tons per transfer, to the steel plant.

Q. What is the usual number of cars in each train?

A. About twenty-three cars—possibly twenty-four or twenty-two, just as it happens to go.

Q. Do you have air coupled up in all these trains?

A. I do.

Q. Do you have in all the trains 100 per cent, or just 85 per cent?

A. I have a hundred per cent of air.

Q. Did you consider that necessary?

A. Yes, as long as we have the equipment we might as well put it on.

Q. Do you have instructions to do that from the Company?

A. I never had any instructions.

Q. And always, as a matter of fact, you always coupled up the air that you had?

A. Yes.

Q. You said you had at that time, if I understood, something like three or four freight trains to the furnace over that line. Do you mean that you have less [then] you made up there?

A. If I didn't have any limestone boat we didn't haul the car out there, if there wasn't a coal boat or something like that, we would have need to haul the car on.

Q. Who supervised the operation of these cars—these transfers over this line?

A. The conductors, I believe.

Q. I mean, under whose general supervision are they handled?

A. My instructions are to go to the steel plant with loads and come back with the empties.

Q. Do you confer with any officials of the Northern Pacific as to when your transfers and trains shall move?

A. No, sir.

Q. They run without orders from the yardmaster of the Northern Pacific, do they?

A. Yes.

Q. How do they know how to govern themselves with respect to the transfers of the Northern Pacific?

A. Why, the track is straight for about two miles, and in the day-time you can see if they are coming, and if they are we use the track up there in that further yard and let them pass. In the night-time we use electric head-lights.

Q. And you are governed, entirely then, by what you can see?

A. Yes.

Q. Are trains still being operated under the same conditions as they were at that time?

A. Yes.

54 Cross-examination of W. A. McWatty, by Mr. Lyons:

Q. Did you have a yardmaster, or do you act as yardmaster?

A. I am the yardmaster.

Q. How many years have you been there?

A. Two years.

Q. During that time have you had any accident or any trouble arising out of the manner in which the Northern Pacific operated its trains?

A. No, sir.

Q. And the fact that they didn't use air on these trains has never resulted in an accident?

A. No, sir.

Q. Your trains don't merely move from your docks to the furnace yard, but also to some other point, coming and going to the steel plant?

A. Yes.

Q. How far is it approximately from the furnace yard?

A. We figure seven and a half miles, or something like that. We allow fifteen miles for the round trip.

Q. When you get out beyond the furnace yard, you have a track of your own on your run down to the steel plant, at least you made trips on that part of it that was in operation?

A. Yes.

Q. And when you get out on that portion there is nothing in the way except other D. M. & N. trains, is that right?

A. Yes.

Q. And you may go as fast as you can make time out there, after you leave on this track—this Duluth terminal track?

A. Yes.

Q. Every time this N. P. transfer moved you tell us the operations there were simply controlled by the conductors of the train?

A. Yes.

Q. There are no train orders, no time table?

A. No.

Q. Or block signals?

A. No, sir.

Q. And the operation by your trains on that track is just the same as in any switching yard?

A. Yes.

Q. Will you tell us whether or not, in your opinion as a D. M. & N. man, that part of that track, from the furnace yard up to your various docks, is on the main line of the D. M. & N.?

A. No, I would call that the D. M. & N. main lead.

Q. What do you mean by lead?

A. That is where our track branches off, for sorting cars.

Q. You have two leads don't you, in all switching yards—all large switching yards?

A. We do.

Q. Where the other tracks branch?

A. Yes.

Q. What is the usual method of leaving a switch onto a lead in the switch-track, or set of tracks?

A. Leave them lined for the lead.

55 Q. And that is what is done with this switch on this Duluth Terminal track, is it—left lined for the lead?

A. Yes.

Q. That is the usual method of operating it, isn't it?

A. Yes.

Q. From the point you take the twenty-three cars, do you have a heavier grade?

A. We do after leaving the Finland college. That is tonnage we can have without doubling the haul.

Redirect examination of William A. McWatty, by Mr. WALTERS:

Q. You say you call that a main lead, Mr. McWatty?

A. Yes, a main lead.

Q. What is the difference between a main lead and a main line?

A. A main lead as I understand it is this: a yard where cars are stored in definite limits and trains are made up. I know we have six or seven here in the Proctor yard, starting from A, B, C, D, E, and F divisions, and we have one lead for each yard—the yard is all together, and these seven or eight tracks lead off over this lead, and the Boston yard has some in there, as I understand it, which lead off from this one track.

Q. And you call this a main lead because it is within the limits of the yard?

A. Yes.

Q. And you operate these trains over this main line in exactly the same way you do over the line leading to the furnace yard, don't you?

A. I don't quite get you.

Q. You operate these trains going to the steel plant in the same way, after leaving the furnace yard, as you do within the yard?

A. Sure.

Q. You have air coupled up in the same way, that is, in the yard, as you do without the yard?

A. Yes.

Q. You speak about having these switch-locks for the switches for the leads. That is for the purpose of keeping the main line open for your trains so that they will not in any way interfere in going to and from your place of business, there at your office?

A. Yes.

Q. Kept open in a manner exactly the same as a main line between two stations out in the country, isn't it?

A. Well, we don't have any switch-locks on these—that is one thing. We find—there are switch-locks, but not on all of them. On a main line the switch is always locked.

Q. But you have some of those [switch]-locks open—it would be [impossible] for any one, except one with a key, to throw the switch, and in that way cause your train to be run off onto a side-track?

56 A. Some of them lock, and some are not locked.

Q. But the switches are all thrown in order to keep the line—the main line—lined up?

A. Yes.

Q. Is it not as necessary, in so far as safety is concerned, to have the air-brakes in operative condition over this line of track referred to—as much necessity as there is on any main line of track between two stations?

A. I would answer in this way: that there are no passenger trains on this line, and as far as safety is concerned, I would not think that it would be, but still, all in all, it would be all right to for to have air. I mean to say that it is not as great a requirement to run trains on this track without air as it would be on the main line, where there are passenger trains.

Q. But it is a fact that if there are passenger trains running on the same track, there is the same necessity for the use of air-brakes?

A. Yes.

Q. And what have you to say with regard to these passenger trains crossing up there; aren't they liable to be affected at some time or other by reason of the fact that these transfers don't have their air coupled up?

A. Well, I suppose they stop or slow up. There is a stop-board approximately two hundred feet on each side of these tracks. We always stop, I know. I don't know what the other people do.

Q. You have air, don't you?

A. Yes.

Q. And you are able to stop with greater ease and certainty than if you don't have air?

A. That is true, yes.

Q. Is it not also true that the fact that this is a very congested district, and the number of railroads crossing this particular track would necessitate the use of air on the transfers?

A. My opinion may not be right on that. I would know—

Q. What do you think about it?

A. That is, at this point in there of which you are speaking, where the Soo crossing is, there by the Berwind yard?

Q. I am speaking about the various railroad crossings that these transfers passed over. In view of the fact that there are so many of them, do you or not consider that as a matter of safety it would be better to have these transfers controlled by means of the air?

A. Why, I should think so.

By Mr. LYONS:

Q. Trains are operated faster on the main line of railroads than they are in congested [districted] isn't that a fact?

A. Yes.

[A.] And you say you have passenger trains on that main line, and have also local freight trains and some through freight trains?

A. Yes.

57 Q. But not on that part of this D. T. track?

A. No.

Q. And as you have already told us, when you get out of that switching district you have to run seven and a half miles to your steel plant?

A. Yes.

Q. And the speed at which a train is operated is of course an important element in stopping it, or any of them?

A. I don't just get you.

Q. Is not the speed at which a train is operated an important element considered in stopping the train?

A. Yes.

Q. And the distance within which you can stop a train depends to a large extent upon speed?

A. Yes.

Q. Take these Northern Pacific transfers; can they—speaking as a railroad man—everything considered, start at full speed when they leave that station—say that they have to come to a full stop for these various railroad crossings?

A. They couldn't get ~~up~~ much speed.

By Mr. WALTERS:

Q. What speed do your trains run?

A. They run this seven and a half miles in thirty-five minutes.

Q. What is the distance?

A. Seven and a half miles.

Q. What is the greatest speed acquired by your trains on that straight track?

A. On the way to the steel plant?

Q. No; starting from the point G to F.

A. Possibly twelve to fifteen miles an hour.

Q. Don't you make 28 miles an hour at times?

A. I couldn't say as to that. I might make twenty miles—that's a hard question to answer.

Q. I may be mistaken, but didn't I understand you to say that you would go as high as 28 miles an hour over that straight track?

A. I don't believe I said it in that way. I couldn't say that. I said we called it to the steel plant seven and a half miles—fifteen miles for the round trip—in from thirty to thirty-five minutes. We make our fastest time at Ironton, where we get our run for the hill. We stop for the Boston coal dock crossing, and then at about four train-lengths we have to stop for the D. W. & P. lumber dock, and as

we carry 1,700 tons we don't get up very much speed, possibly twenty miles an hour, to the best of my knowledge.

Q. Didn't you say a while ago there had never been an accident—no accident had occurred out there on your line by reason of the fact that the transfers were not coupled up with the air?

58 A. We had accidents all right, derailments of cars on the N. P.

Q. But nothing happened on your line?

A. Well, that main line had twenty-three cars went off the track. That is the only thing—

Q. Isn't it true a transfer ran into one of your trains at a crossing there and injured one of the crew on that crossing?

A. Not while I was there. You are referring to the instance I spoke to you about?

Q. Yes.

A. If I remember the statement, that was a brakeman, but I couldn't give you the name of the man who said it—couldn't tell me who it was.

Q. Was that hearsay on your part?

A. Yes.

Q. Merely hearsay—you don't know anything about it of your own knowledge?

A. No, sir.

Witness excused.

Orlow E. Owens, called as a witness on behalf of the Government, and being first duly sworn, testified as follows, to wit:

Examination in chief by Mr. WALTERS:

Q. What is your business?

A. Yardmaster.

Q. For what company?

A. The Duluth & Iron Range.

Q. Do you have charge of the log trains that move over the line of the Northern Pacific railroad out to the sawmill of Alger-Smith Co.?

A. No, sir.

Q. Who has charge of them?

A. The conductor.

Q. This conductor is under your orders, is he not?

A. No, sir.

Q. What jurisdiction do you have?

A. Nothing south of—well, I have jurisdiction of track to about Seventh Avenue West, going east. That's as far as my jurisdiction goes.

Q. Do you know about how many log trains there are a day on the Duluth & Iron Range, operated over the line of Northern Pacific railway, from the furnace yard to this point, near Rices Point, over this line of track?

A. All this summer all we had is that one train from Knife River. Exceptional weeks we will have two a day.

Q. But this is the only one—that is, one is the usual number?

A. Yes.

Q. What time of day does it arrive in Duluth?

A. It generally gets to Endion about 7.30 in the morning.

Q. Where is Endion?

A. Fifteenth Avenue East.

59 Q. And you arrived about what time?

A. About seven-thirty.

Q. What route does it follow after it leaves Endion?

A. It goes right down the main line, crosses to Rices Point, and over to the West Duluth mill.

Q. What do you mean, West Duluth mill?

A. Alger-Smith mill; the other is at Garfield Avenue, where they take the other line.

Q. Well, you say this train got to the Alger-Smith Lumber Company's plant—what route do they take after they leave Endion?

A. They go right down past the union depot, on the Northern Pacific tracks.

Q. And where do they go then?

A. I couldn't say.

Q. You are not familiar with their route beyond that?

A. No.

Q. Do you know whether or not, they always have the air coupled up?

A. They always have at Endion, at the time they leave and when they get back there.

Q. Full hundred per cent?

A. Yes.

Q. On your train, and all empties returning, they have the air coupled up, don't they?

A. Yes.

By Mr. LYONS:

Q. They move over the main line, do they not?

A. Yes.

Witness excused.

Howard M. Burtch, recalled for further examination.

Direct examination by Mr. WALTERS:

Q. What railroad experience have you had, if any?

A. Nearly twenty-seven years.

Q. In what capacity?

A. Twenty-five years of that was in yard service, practically six years as switchman and yard conductor, fifteen years as yardmaster, and four years trainmaster in the yard.

Q. Where were your services as switchman principally?

A. In Chicago.

Q. On the line of what railroads?

A. Thirteen years with the Illinois Central, and thirteen years with the B. & O.

Q. Was your work within the city limits of Chicago?

A. It was all within the city limits.

Q. You had about fifteen years with *on* the line of the B. & O.?

60 Q. Thirteen, and thirteen years with the Illinois Central.

Q. In what capacity did you serve for the B. & O.?

A. Well, I was one year yard conductor, eight years yardmaster and four yard trainmaster.

Q. Did you have transfer movements over the line of the B. & O. which were similar to those here in Duluth?

A. Well, nearly all the movements around Chicago are transfer movements—one a day—South Chicago is twenty miles from Chicago, from the freight-house and depot there. We only had one freight train that ran in there direct. All the rest of our movements around the Chicago switching district that we designated as the old Chicago district, went by transfers.

Q. Do you know the length of the Chicago switching district?

A. It is approximately forty miles long and ten miles wide.

Q. What are the longest hauls in the transfers there in the Chicago switching district?

A. Well, twenty miles—twenty miles south; to the Indiana Belt Line on the B. & O. there is a thirty-five mile haul.

Q. What are the shortest movements that you had—the shortest haul?

A. Why, the shortest—half a mile. That was from the yard, the South Chicago yard of the B. & O. to that old Belt Line at Chicago.

Q. Did you have the air coupled up on these?

Mr. LYONS. Objected to as incompetent, irrelevant and immaterial.

The COURT. Answer the question.

The WITNESS. Yes.

Mr. LYONS. Exception.

Q. (By Mr. WALTERS.) Why did you do that?

Mr. LYONS. Objected to as incompetent, irrelevant and immaterial.

The COURT. Go ahead and answer the question.

Mr. LYONS. This witness is testifying concerning a movement of a different kind than existed in Duluth.

The WITNESS. We considered it less dangerous.

Q. (By Mr. WALTERS.) Why?

A. This instance I am speaking about is if transfers over the B. & O., to the Belt Line in South Chicago were less dangerous than in Duluth.

61 Mr. LYONS. May it be understood that we object to this line of questioning, and except to your honor's ruling, then I won't interrupt with separate objections?

The COURT. Go ahead.

By Mr. WALTERS:

Q. What situation exists here in Duluth that makes it more dangerous than the situation that existed there in Chicago?

A. In this movement that I am speaking about there is only one railroad crossing. There is a direct line a little over a mile long from one point to another, and there is only one crossing and that was handled by a target and semaphore—just the one point between the two yards, and no other until you get out of this district.

Q. Do you figure, considering the matter of safety alone, that the situation here requires that these transfers should be under the control of the engineer, by means of the air-brakes?

A. I have read a lot in the last few years about all the railroads preaching "safety first." They put on these air brakes on these trains as a matter of safety. It is my opinion they should always be used, except in a short switch in a switching yard.

Q. What do you mean by short switch?

A. That is where a switch engine pulls one or more cars on a track, breaks up a train, and making up trains—that is, an inside yard movement, so it is improper to couple up the air, because they couple it up and two minutes after have to cut [if] again at any short switch. But when a train is made up and pulls out of the yard three or four miles to another yard and waits possibly fifteen, twenty, thirty, or forty minutes to possibly an hour, the air brakes are put on there to be used and should be used.

Witness excused.

Job H. Strickland, called as a witness in behalf of the Government, and being first duly sworn, testified as follows, to wit:

Examination in chief by Mr. WALTERS:

Q. What is your business?

A. Inspector for the Interstate Commerce Commission.

Q. How long have you been an inspector?

A. Thirteen years the 5th of December.

Q. Your line of work is similar to that of Mr. Burtsch and Mr. Lenhart?

A. Yes.

62 Q. Have you had any railroad experience?

A. Yes; fifteen to eighteen years.

Q. In what capacity?

A. I have been a brakeman and conductor and air-brake instructor, general road foreman and yardmaster.

Q. What were your duties as air-brake instructor?

A. Instruct employees of railroads in the control, operation, and use of air brakes.

Q. Are you familiar with air brakes, with the operation of air brakes on freight and passenger trains?

A. Yes; to a certain extent.

Q. As air-brake instructor, for whom did you work?

A. Massabe-Duluth, Missabe & Northern Railroad.

Q. Where did you work?

A. At Proctor and out on the line from Duluth to the Ranges and all of its branches.

Q. Are you familiar with the lines of railway in and about Duluth as testified to by these witnesses, between Rices Point and the furnace yard?

A. To a certain extent. Things have improved here since I was here several years ago.

Q. What do you say if anything concerning a movement, purely as a matter of switching, as to whether or not safety would be enhanced by coupling up of the air to transfers such as have [—] described here to-day between Rices Point and the furnace yard?

A. Well, all trains could be operated more safely with the air coupled up than they can without it.

Q. Does that apply to these particular transfers?

A. To any transfer.

Q. Do you know where any less danger would exist by reason of not using the air brakes on these transfers than if it were not used on main-line yard movements between designated stations out on the line of railroad between two particular towns?

A. I don't know as I exactly catch your meaning.

Q. Do you know of any reason why that less danger would exist by reason of the nonuse of the air brakes on these transfers than would have existed if the movement had been on a main line between two designated stations or two designated points on the line of the Northern Pacific Railway?

A. No, sir.

Q. Would you consider the danger any greater or less in the case of these transfers?

A. I would consider it more dangerous.

Q. Why so?

A. Because of the condition that [exist].

Q. Well, what condition?

63 A. In the average conditions between stations there is less liability for to have emergencies arise, than it would be where there are passenger trains going across to railroad stations.

Mr. LYONS. Of course, on the main line trains are operated at from forty to fifty miles an hour, aren't they?

The WITNESS. Some roads.

Witness excused.

Government rests.

DEFENDANT'S CASE.

(Mr. Lyons makes statement of defendant's case to jury.)

W. H. Strachan, called as a witness in behalf of the defendant, having been previously sworn, testified as follows, to wit:

Examination in chief by Mr. LYONS:

Q. Mr. Strachan, these terminals are part of the Lake Superior Division?

A. Yes.

(A paper marked for identification as Defendant's Exhibit A.)

Q. Mr. Strachan, I show you a blue print, defendant's Exhibit "A," and ask you to state what it is.

A. That is a [blue-print], showing the track layout between Duluth and West Duluth, and Superior.

Q. On this map, Exhibit "A," there are red lines. Please tell what these red lines indicate.

A. Indicate the main line of the Northern Pacific Railroad along Duluth, and part of Superior.

Q. Do they show the main line from the union depot running through to Rices Point, and over to Superior?

A. Yes.

Q. These red lines?

A. Yes.

Q. Do the red lines show the main line running from the union depot down to Twentieth Avenue?

A. Yes.

Q. What do you call that?

A. That is known as the third district of the Lake Superior division.

Q. Is that the Old Duluth Short Line?

A. Yes, St. Paul & Duluth.

Q. And also shows the main line crossing Grassy Point bridge over to Superior?

A. Yes.

64 Q. Where on that map do you find the track referred to by some of the witnesses as the Duluth Terminal, the D. T. track, the track over which these transfers moved?

A. It is on the inside of the main line between Rices Point and the furnace yard.

Q. Is there indicated on that line the various yards that have been referred to in the evidence this morning?

A. Yes.

Q. The Rices Point yard?

A. Yes.

Q. The Boston yard?

A. Yes.

Q. The Berwind yard?

A. Yes.

Q. And the furnace yard?

A. Yes.

Mr. LYONS. We offer defendant's Exhibit "A," in evidence.

Received without objection.

By Mr. LYONS:

Q. Now, these various yards and these terminals were here before you were superintendent?

A. Yes.

Q. You have been railroading a great many years?

A. Thirty-eight.

Q. You were superintendent on the Northern Pacific, I believe, out in the Dakota Division?

A. Two years.

Q. Can you state how many years we have been operating the Duluth Terminal?

A. Six years—it has been operated six years.

Q. Now then, that track is called the Duluth Terminal?

A. Yes, that's what it is named, the Duluth Terminal.

Q. That was the original name of it at the time the Northern Pacific purchased it?

A. Yes.

Q. And about when, roughly, did the Northern Pacific purchase it?

A. 1900, I think.

Q. Now then, originally, that line did what, if you know?

A. It did the industrial switching. It was built to take care of any industries that might locate on the water front.

Q. And the Northern Pacific has developed that track—that switching track, from time to time?

A. Yes.

Q. And that was done before your time?

A. The greater majority—I have had charge of the development.

Q. The development has been within the last three or four years?

A. Four years.

Q. What constitutes the Rices Point yard?

A. Fifty-five tracks.

Q. How long are they?

A. They will average close to four thousand feet.

Q. This is the largest terminal on the Northern Pacific?

65 A. Yes.

The COURT. Do you mean each track is four thousand feet in length—fifty-five tracks, four thousand feet long?

The WITNESS: Yes, sir.

By Mr. LYONS.

Q. And along between Rices Point and West Duluth is a single line or a double line?

A. A single line.

Q. How far does it continue as a single line?

A. About a mile, I should say.

Q. Until you get to what point?

A. To the D. M. & N. dock.

Q. Then as you go up here from Rices Point it is a single line of track, do you say, for about a mile?

A. Yes.

Q. And over to the north of it is the main line of the Northern Pacific?

A. Shown in red, there [indicating on map].

Q. When you go out to the D. M. & N. on this It. T. track, you go on the same tracks?

A. Yes; there are six or seven parallel tracks there, called the Boston yard.

Q. Why are those tracks called the Boston yard?

A. It is called that because there is a dock there.

Q. The Boston dock?

A. Yes.

Q. How long are these tracks?

The COURT. (Examining map.) Marked on the map, defendant's Exhibit "A," Boston dock, in lead pencil along in there between the track of the Missabe ore docks, how far does that yard extend?

The WITNESS. There is a railroad crossing at the end, along there at the Boston dock.

The COURT. Marked on the map "Boston dock?"

The WITNESS. Yes. The switching yard is immediately—just about opposite the dock property.

The COURT. How many tracks are there?

The WITNESS. There are six or seven over there, near the Boston dock, that cross between that point, and a switch beginning at the Boston yard switch. Up to the D. M. & N., where there are three tracks.

By Mr. LYONS:

Q. There are three tracks along there from the D. M. & N. coal dock to the switch leading to the Boston coal dock?

63 A. Yes.

Q. And then from the Boston coal dock, going west over the tracks known as the Boston yard, there are tracks along there, how many in number?

A. Six or seven, I have forgotten.

Q. And how long?

A. 4,700 feet, as I remember it.

Q. Then you say just beyond there is another system of tracks?

A. Yes, known as the Berwind.

Q. How far between the Boston and Berwind dock—tracks?

A. About 3,400 feet.

Q. How many tracks are there at the Berwind?

A. Nine.

Q. And about how long?

A. Between 3,500 and 4,000 feet.

Q. Then, beyond the Berwind there is another system of tracks?

A. Not until you reach the furnace yard.

Q. How far is it from the Berwind switch yard to the furnace switching yard?

A. 2,500 feet.

Q. And is there more than one track going to them?

A. Two, part way.

Q. Only a part of the distance?

A. Yes.

Q. And then at the furnace, how extensive a system of switching yards have you there?

A. There are two yards at the furnace, one directly opposite the furnace, that has four tracks, and another a short distance west, that is where they really join, just room for a switch between them, and there are [el'ven] tracks.

Q. And you call all of these the furnace switching yard, or do they go by a different name?

A. All furnace yard.

Q. How is Rices Point yard proper divided?

A. There are three sections, A, B, and C.

Q. How is that divided—what is the basis of division?

A. Three separate leads.

Q. What do you mean by leads?

A. Where there are lead tracks—leading from.

Q. Tracks from which the yard tracks lead from?

[—]. Yes.

Q. How are the switches left for the lead in the switch-track?

A. When not [is] use, to the lead.

Q. Lined up for the lead?

A. Yes.

Q. Now then, as to the method of operating trains in this district which you have described, extending over the point that you have marked Rices Point yard, including the furnace yard, how are trains operated there?

A. When the yardmaster tells the foreman to get a string of cars, and to take it to the Boston, furnace, or the Berwind, he does as he is told.

Q. Are there no train orders given?

A. No, sir.

Q. Or any time cards used?

A. No, sir.

67 Q. Or any block-signal operations?

A. No, sir.

Q. Has any one train any right-of-way over another train?

A. No, sir.

Q. At what rate of speed are these trains operated?

A. They don't go very fast. I wouldn't want to say just how fast. They stop so frequently that they must go slow. They can't get very much momentum between stops, before it is time to stop again.

Q. I don't exactly mean the rate of speed, but what I mean is, what are the rules governing the engineer operating the train?

A. He must run so that he can stop within vision.

Q. How are your trains operated on the main line which is outlined in red ink on this map?

A. On double track they don't receive orders; they are scheduled, however. Extra trains run without orders on double track. On main line single track they have train orders.

Q. State whether or not this piece of track, from Rices Point to the furnace yard is in your judgment main line track.

A. No.

Mr. WALTERS. Objected to as calling for the conclusion of the witness.

The COURT. I know if Mr. Strachan considered that a main line he would have all these cars coupled up, so he need not answer the question.

The WITNESS. I would not consider it a main line.

By Mr. LYONS:

Q. Now, we introduced some rules from that book of rules this morning—I suppose you heard them read from the book of rules at that time. Let us have it read into the record again—the meaning of main line or main track as defined in the book of rules of the Northern Pacific Railway—is this D. T. track a main line?

Mr. WALTERS. Objected to as immaterial. The question is whether or not these transfers were handled in accordance with law.

Mr. LYONS. What I have in mind is this: I imagine that when Congress passes a law concerning the operation of railroads it uses certain terms, and when courts use certain terms in delivering opinions concerning the operations of railroads, they use these terms in the ordinary meaning, and that was what *that* I was aiming at.

The COURT. Well, go ahead, and let us have the rule.

By Mr. LYONS:

Q. What is the number of the rule?

A. It is found under the heading, "definitions," on page 9.

Q. And that was read into the record this morning?

A. Yes.

(Mr. Lyons reads from book.) "A track extending through yards and between stations upon which trains are operated by time-table or train order, or the use of which is controlled by block signals." Have I read that correctly?

A. Yes.

Q. My question is whether or not this D. T. track is a main line track within the meaning of that rule?

A. It cannot be.

Q. Do you operate any passenger trains on that D. T. track?

A. No, sir.

Q. Do you operate any local freight trains on that D. T. track?

A. No, sir.

Q. Do you operate through freight trains?

A. No, sir.

Q. What do you mean by through freight trains?

A. A train that is made up in the yard and starts for another terminal—a distant terminal.

Q. And you run through freight trains all the way to St. Paul, don't you?

A. Yes.

Q. That is simply one division?

A. Yes, one division.

Q. Suppose you have some cars down in the furnace yard that you want to send over to Superior—this often happens?

A. Oh, yes; lots of times.

Q. How do they go?

A. They go by Rices Point.

Q. They don't go across Grassy Point?

A. No, sir.

Q. Do any freight cars move across Grassy Point?

A. Yes.

Q. Where are they from?

A. I will explain that; the size of our trains through the period of navigation is a maximum of thirty cars over the St. Louis Bay draw, but when a train has more than this number—more than thirty cars—it goes the Grassy Point way, and possibly in those trains that go there, there are cars that were loaded in these industries about the furnace yard that have been brought to Rices Point yard.

Q. What I want to get at is this: if you were operating a train across Grassy Point bridge, do you, or do you not, when you operate the train over this track to Superior, use air?

A. Yes, sir.

Q. Use hundred per cent air?

A. Yes, hundred per cent air.

Q. Why is that?

A. Because it is a main line.

Q. You are out on the main there?

A. Yes.

69 Q. The transfer that Mr.—the first witness for the Government rode, didn't set out any cars between the furnace and Rices Point?

A. I don't know that it is a fact. I am taking Mr. Lenhart's word for it.

Q. If it did, and that is true, as the witness testified to it, and [assumong] that to be the fact, I will ask you whether that is usually true of these trains that he calls transfers?

A. I don't know just how often they make their trips. I might say—I think Mr. Atmore can tell better than I can.

Q. Isn't it a fact that some of them, without going into the question of number, pick up cars at various points down there?

A. Oh, yes.

Q. Moving from Rices Point, going down toward the furnace, state whether or not any of these trains set out cars at various points?

A. Yes, they peddle them out all along.

Q. Will you state, whether or not in the actual operations, that entire district, from the furnace yard up to and including Rices Point, is operated as one switching yard?

A. Yes.

Q. Where do you do your classifying of cars?

A. At Rices Point yard.

Q. What do you mean by a classifying yard?

A. Where we break up trains and distribute the cars on tracks that are set aside for that purpose.

Q. And the reverse of that when making up trains?

A. Yes.

Q. There is no classifying done in any of these other so-called yards?

A. No.

Q. Is Rices Point a station on the time-table of the Northern Pacific?

A. No.

Q. Is the Boston yard, and the Berwind yard, or the furnace yard, a station, or stations?

A. No, sir.

Q. Are cars sorted in any of these yards?

A. Not lately, but when we have a surplus they are.

Q. Are any road engines used in switching in this yard?

Mr. WALTERS. Objected to as immaterial, whether they are designated as road engines or switch engines.

The COURT. Objection overruled.

Mr. WALTERS. Exception.

The WITNESS. We have used a road engine in case of the failure of the switch engine, only.

70 By Mr. LYONS:

Q. In ordinary operations you used switch engines?

A. Yes.

Q. Are bills of lading issued at any of these yards?

A. No.

Q. Can you tell us generally how extensive the business is down there?

A. In the fall of the year—in some particular year?

Q. I mean on the D. T. only.

A. In the fall and winter when the coal movement is good, I presume we load 250 to 300 cars a day.

Q. You load 250 or 300 cars a day?

A. Yes.

Q. What is the objection to coupling up the air on these transfers?

A. It takes too long to do that.

Q. About how long; what is the operation?

A. Well, we have to have men there to couple up the air, and then stand still while the pump is charging the train-line, fifty or sixty

cars in the winter time, and it will take an hour, maybe an hour and a half to get the air working.

Q. You operate under difficulties here a considerable portion of the year, don't you?

A. Yes, sir.

Q. On the question of safety of operation, that is, as to the method of operating these trains, will you tell us whether, as far as you know, any accidents have occurred through failure to have the air coupled up in these trains?

A. Since my coming here, to my knowledge there has not been any accident that you could attribute to the lack of air.

Q. Now, as to the D. M. & N. movement; how long has that been going on?

A. It will be two years the coming September, as I remember it.

Q. Did the D. M. & N. go in there on that track at all during the building of the steel plant down here?

A. No.

Q. And as the dock agent has already stated, they go in there for coal and lime!

A. They deliver some lime there.

Q. Do you have anything to do with the operation of these D. M. & N. trains?

A. No, sir.

Q. They are operated in what way?

A. Well, they go when they are ready.

Q. Go in there on train orders?

A. None at all—excuse me—I don't know about the D. M. & N. I am speaking of the Northern Pacific track in there. When they go in on the D. M. & N. I don't know what they do.

Q. I am not speaking about the Northern Pacific tracks. I am speaking about this D. T. track.

A. They have no train orders at all.

71 Q. Do they move just as you switch trains moving in a switching yard?

A. Absolutely.

Q. With reference to this Duluth & Iron Range movement, I don't know whether you have been asked as to the number of trains—log trains—operated by that line; one log train a day, wasn't it?

A. I think I testified to this this morning.

Q. They moved in that movement, as has been described, to the Alger-Smith mill plant?

A. Yes.

Q. Is this the practice of operating these trains in the way that has been described by the Government's witnesses upon the track of that D. T. ever since you have been here?

A. Yes.

Q. What would be the result, so far as the operation is concerned, of requiring the air to be coupled up on those trains—the practical results?

Mr. WALTERS. Objected to as calling for the conclusion of the witness.

Mr. LYONS. I just want the facts as to show it would work in actual operation.

The COURT. Proceed.

Mr. WALTERS. We want the facts, and let the court and jury draw their conclusions.

By Mr. LYONS:

Q. Don't you know whether it would be a good thing or a bad thing; I want to know how it would work in actual operation?

A. Well, it wouldn't work out, because we could not do the actual handling of the cars without putting on more power.

Q. What do you mean by putting on more power?

A. We would have to work more engines, and we would probably have to bring some of the freight around on the main line, around by West Duluth and Twentieth Avenue.

Q. Are there very congested conditions there at the present time?

A. No; but it is congested during busy seasons.

Q. How many switch engines do you work in there?

A. Eight or nine.

Q. That is, including Rices Point yard?

A. Oh no; that is just on Duluth terminal, the usual number runs from forty-six to 47 on the terminal.

Q. Switching trains?

A. Yes.

Q. Did you say you would have to increase the power; that is, number of engines?

A. I think so.

72 Q. Would it delay the movement of these trains?

A. It certainly would.

Cross-examination of W. H. Strachan, by Mr. WALTERS:

Q. There is only one track that is kept lined up for these through transfers between Rices Point and the furnace yard?

A. Only one for the through.

Q. What about these other tracks that you refer to in these various yards that run parallel to this particular D. T. track, over a mile from the sidetrack?

A. Oh, we often use them same as the rest of the tracks.

Q. But this particular track; there is only one track that is used for these particular transfers?

A. I wouldn't say that.

Q. What other tracks are used?

A. Any of the open yard tracks. They use them very often going in either direction.

Q. For those transfers?

A. Yes.

Q. Under what circumstances?

A. I can not tell you; I know they use them.

Q. When do they use them?

A. For instance, under circumstances when we have something moving on this track. If trains are going in the opposite direction they would go through one of these yard tracks.

Q. What direction—what trains?

A. These transfers on the D., M. & N. There are certain points where you have to wait to allow those other trains to pass. They would go through at only one point.

Q. Where is that?

A. That is between the furnace yard and a switch leading into the Berwind yard.

Q. As a general rule, these transfers use this particular track as described this morning—this D. T. track—kept lined up for that class of traffic?

A. Sure.

Q. Do I understand you to say these engines have instructions to proceed at such a speed that they can stop within vision?

A. Yes.

Q. Why is that?

A. It is within yard limits—switching territory.

Q. Under what condition—no schedule; no one safe; it is every man for himself?

A. They work under the yard-limit rule.

Q. Isn't it for a matter of safety that it is done at such speed that they can stop within vision?

73 A. Certainly, that is why we have yard limit rules—for safety.

Q. Now, if these transfers are equipped with air, and connected up, it is possible to stop these trains with less jar, with more evenness, and under better control generally, than if they undertake to stop without the air?

A. Not very much.

Q. It is some better?

A. Oh perhaps; not much. I have ridden these air-brake trains for many miles, and hand-brake also.

Q. Are you familiar with the use of the air-brake?

A. Not the operation of it.

Q. Well, you understand, don't you, that in the use and control of trains by means of air brakes, that the brakes are applied on all cars at approximately the same moment?

A. Yes, sure.

Q. When the air brakes are not used, you would not depend on the brake—the engineer stops the train, doesn't he?

A. Yes, with what we call the reverse lever.

Q. And that is applied on the wheels of the engine and tender?

A. Yes.

Q. Well, doesn't that have a tendency to effect buckling of the train?

A. No.

Q. Why not?

[—] Because there is not enough speed. We don't reach the momentum that we do when connected with air.

Q. How about the jar—would it be any greater or any less if the air was not coupled up, than if the air was coupled up?

A. Not much, on our engine brake they can slack up slowly very easily. We don't get much jar.

Q. Suppose one of these transfers was moving at the rate of from 12 to 15 miles an hour could it be stopped with greater safety and less shock to these transfers, with the air-brakes, than it could if they were not used?

A. No.

Q. Would you say there would be less shock if you had used the air than if you had not used the air?

A. I think so, a little, if it were an emergency stop.

Q. You say this D. T. track is not a main line track as you read the book of rules?

A. I would not say so.

Q. State what things are necessary to make this track a main line track.

A. Well, the definition—you have heard it read half a dozen times.

Q. State what things are necessary in order to make this a main line track.

A. Stations, and time-table.

Q. And as you stated, there are no stations?

A. No.

Q. No train orders?

A. No.

74 Q. No block signals?

A. No.

Q. Anything else?

A. That's all.

Q. What do you mean by station?

A. A place designated on the time-table by name, at which a train may stop for traffic; or enter or leave the main track, or from which fixed signals are operated.

Q. Then you think if you had on your time-table these two—the furnace yard and Rices Point yard, that that would be one factor toward making it a main track between these places.

A. No, I don't think so.

The COURT. I didn't hear that question.

Mr. WALTERS. The witness stated that these are not stations because they are not shown on the [on the] time-table. I asked the witness that if it appears on the time-table—that if the furnace yard and Rices Point appears on the time table, that it would be one a factor, didn't show that line between these two yards was a main line?

The WITNESS. It might be a factor, and the fact still [remain] that they are but one yard.

By Mr. WALTERS:

Q. Would not that be a factor toward making a main line track?

A. Perhaps so.

Q. If these trains were operated under a time-table, that would be one factor?

A. Yes.

Q. If they were operated by block signals it would be one more factor in making this a main line?

A. Yes, it could be that.

Q. If they were operated under train orders, it would be another factor?

A. I presume so.

Q. By reason of having all these factors, do you testify that the necessity or demand for the use of air is lessened in the movement of these transfers?

A. I think so.

Q. Well now, why?

A. The movement is carried on perfectly safe, and it has never had an accident—absolutely safe—and it is the thing to do.

Q. Well now, why; does the fact that these points are not down on the time-table obviate the necessity of or demand for the air?

A. Because it is a yard, a yard, pure and simple.

Q. How does that follow?

A. It cannot be anything else.

Q. I don't get your reason, as to why the fact that these yards are not shown on the time-table, lessens in any the necessity for the use of air in controlling these transfers.

A. There is no necessity for air on these transfers.

Q. Why is that?

75 A. Because they handle the traffic perfectly safe, and faster than we can do it when coupled up by air.

Q. And you say with greater safety?

A. Seventeen years of operation and no accidents ought to be a good indication it is pretty safe.

Q. Is that why Congress enacted the law?

A. I don't know anything about that.

Q. And you think it is safer to operate a train without the air as with it?

A. On that class of train, just as safe.

Q. Can you stop a train with the ease and smoothness and quickness without the use of air as you can with the use of air?

A. All except the quickness; yes.

Q. Didn't you state awhile ago it was a greater shock to the equipment; or didn't you say you could make an emergency stop just as easily as any other stop?

A. No.

Q. But you stated that you can stop as quick without the use of air as quickly as when using the air.

A. I didn't say so; no.

Q. Can you say so?

A. No.

Q. Can you with the same degree of safety to the equipment, and to the employees,—that is, with one as well as with the other?

A. When it is not an emergency stop; yes.

Q. How about an emergency stop?

A. In an emergency stop you are liable to get a little jar.

Q. You say that the fact that it is not operated on the time-table goes to show that it is not a main-line movement, and consequently a movement that could be controlled by the use of air. If these trains were operated under time-table, is it not true that the employees would be more advised as to meeting trains—when they would meet, and they would be advised as to the time of their absence, so they could govern themselves under these circumstances, and there would be less use for the air?

A. No; you are all wrong there.

Q. That would eliminate the existence of danger. Trains switching cars would look out for any freight trains, and so it would be just the same operation—they would know?

A. They would not be looking for them at all.

Q. Well, that is because they are not operated under time-table?

A. No; if they were.

Q. If there were time-tables?

A. Surely.

Q. If there were time-tables the employees would know when and where to meet them, wouldn't they?

A. No.

Q. Why?

[—] Because yard limit rules govern switching screws, and the right to occupy the tracks within the yard limits without protecting against local scheduled trains, so it resolves itself into the same condition that you have got now, the way I look at it.

Q. Now, recalling your definition, as these trains are not operated under train orders, do you figure that they lessen the necessity for air—the use of air on these transfers?

A. Yes.

Q. And you say they are not governed by the block signals?

A. No.

Q. What do I understand you to say constitutes a through train?

A. A train made up at one terminal going to another.

Q. You cited as an instance a train going from Duluth to St. Paul, didn't you?

A. Mr. Lyons, did; yes.

Q. And considered that as an instance of a through train, and you assign it as an instance of a through freight train?

A. Yes.

Q. Why is that? Why do you say that?

A. Because going from Duluth to St. Paul is through service.

Q. Do you know of a station that is mid-way between Duluth and St. Paul?

A. Yes; Hinckley.

Q. Do you mean you have a through train between Duluth and Hinckley?

A. Yes; we do, and turn them there and bring them back.

Q. Why do you say, then, that these transfers originated at Rices Point, containing forty-eight cars, destined to the furnace yard, with no switch—right there do you say that it is not a through train between these two points?

A. Because it is one and the same yard. It is all the same district—one switching district.

Q. Suppose that switching district were to extend fifty miles to a point, and moved all its transfers over to the other end of this switching district—wouldn't that be a through movement?

A. I don't know of any yards that are that long, unless it might be in Chicago. There might be a yard from one end of Chicago to the other.

Q. And that movement would be a through movement, providing the train ran over a track such as Mr. Burtch was testifying about?

A. I don't know what the situation was.

Q. Would that effect the question of whether it is a through movement?

A. Maybe it was, I don't know.

Q. What I am getting at is, why do you say that this movement between Rices Point yard and the furnace yard is not a through movement?

77 A. Because it is a yard movement between these two yard limits. It is all one switching district, that is the reason.

Q. Then you think if the Northern Pacific should wish to extend their yard limits any distance that such a movement is not extreme?

A. No; I don't think that it is likely they are going to undertake anything of that sort.

Q. At the present time what is the extent of this district covered by the corporation of Duluth?

A. Approximately thirty miles long, I believe, half a mile wide, and any altitude you want.

Q. Does the Northern Pacific operate trains across the entire district of Duluth?

A. No.

Q. What is the greatest length or distance over which the Northern Pacific within the limits of Duluth?

A. About sixteen miles. I don't know just where [where] the western boundary of the city terminates—how far beyond Fond du Lac. Fond du Lac is about sixteen miles from the beginning of the Northern Pacific tracks from the east end.

Q. Do the yard limits of the Northern Pacific extend beyond the limits of Duluth district?

A. No, sir; they don't go clear through Duluth.

Q. They don't extend to the outer limits of Duluth?

A. No.

Q. You say you ran trains of cars from the furnace to Superior through Rices Point?

A. Yes.

Q. Over what track do they pass going from the furnace yard to Rices Point?

A. The D. T., and then the cars are taken to Rices Point and there classified, and then moved to Superior; some to the Soo Line, some to the Great Northern, and some to the Omaha.

Q. I understand you had two movements from Superior—through Rices Point to Superior?

A. No; I didn't say so.

Q. I probably was mistaken. You say you have cars moving from the furnace yard over to Superior through Rices Point.

A. Oh, yes.

Q. They are classified at Rices Point?

A. Yes.

Q. After classification they are made up into another train or transfer?

A. They are.

Q. They couple up the air in this case before they leave Rices Point to go to Superior?

A. Yes.

Q. Why do they couple up the air?

A. Because it is a main-line movement.

Q. Does the matter of safety enter into that at all?

A. Oh, yes; they run at somewhat higher speed.

Q. What speed do they make?

78 A. After the blocks are all clear, they go along at eighteen to twenty miles an hour.

Q. Do you figure that there is greater danger by reason of not having the air in passing over the bridge than you would meet in passing from the furnace yard down to Rices Point?

A. Yes.

Q. Why so?

A. It is a faster movement. You have got to go faster or you would be congested; you are meeting trains right along. We don't run as slow as we do on the D. T.

Q. The evidence is that one of these transfers made as high as fifteen to eighteen miles an hour.

A. I would like to see one of them go as fast. I have never seen one.

Q. You say Rices Point yard, and Boston yard, and these other freight-yard stations—by that you mean—what do you mean?

A. They are all parts of the yard system in this terminal.

Q. Does you line haul all of the traffic from Rices Point originating at Rices Point and the furnace yard?

A. There is not any business originating at Rices Point. It is all brought in there for classification.

Q. Is there any business that originates at the furnace but what is destined to Rices Point?

A. No.

Q. I asked if you load any traffic originating at the furnace yard consigned to Rices Point?

A. No.

Q. What kind of traffic is handled principally out of the furnace yard?

A. Principally coal, pig iron, and other commodities.

Q. And where is that generally consigned to?

A. All over the country.

Q. And practically all of it goes through Rices Point, does it?

A. All of it.

Q. And then the cars are classified down at Rices Point?

A. Yes.

Q. What do you mean by "classified"?

A. Cars go out of these industries; perhaps one for the Soo, the next will be for the Omaha, and the next for the N. P., and so forth.

Q. You are speaking about the furnace yard?

A. Yes; they are loaded there, brought to Rices Point, and there classified as to destination.

Q. Let me ask you; what is the difference in the method of that operation and the operation of trains, say, between two stations, where it is necessary to classify the consist of these trains at these various stations; isn't the method the same?

A. At Rices Point?

79 Q. Yes.

A. Yes, sure.

Q. Say you have a main line track running from the city of A to the city of B, and on this track there are cars consigned to the cities of C, D, E, and F. What is the difference in the method of operation in that instance from A and B, and in this instance between the furnace yard and Rices Point?

A. Do you mean after the cars get to this destination, B?

Q. No, between A and B—the operation of that train between A and B, and the operation of that transfer between the furnace yard and Rices Point.

A. That is not a switching [movement] is it?

Q. I am asking you, which one of these movements was a switching movement?

A. If the cars went to your terminal B without going into the yard it would be a through movement.

Q. Yes. Is that also not a through movement between the furnace yard and Rices Point?

A. No.

Q. And you say there is no such movement between the furnace yard and Rices Point as between A and B?

A. No.

Q. Why not?

A. Because, as I have stated, that is a switching operation pure and simple.

Q. That is a question we have to decide in this case. Do you say that one is a switching movement and that the other is not a switching movement?

[Q.] One is a through movement and one is a switching movement.

Q. That is the question—why do you say one is a through movement and the other a switching movement?

A. I have told you before, this is all one yard. That is why it isn't anything like your terminal B.

Q. Well, suppose between B and A there was a number of switches, and at these switches you had a crew to switch cars to another place?

A. The local freight train does that.

Q. And the local freight down at these switches between Rices Point and the furnace yard does that, don't they?

A. No, sir.

Q. How is it done?

A. It is done by the switching transfer crew, who are employed in doing nothing else except to switch around yard terminals, switching cars in the classified yard, and starting them on their journey—get them started on their journey.

Q. In this movement, between A and B, where these cars are switched out at the various stations—I suppose these trains have air coupled up, don't they?

A. Yes.

Q. You say it takes too long to couple up the air. How many transfers of the kind involved in this case do you handle a day?

A. I don't know just how many there are now.

Q. Do I understand you to say that it would probably necessitate getting more power and engines to do this work?

A. Yes, in the fall and winter, as I said, when coal is moving freely.

Q. Under these conditions how many transfers are moved in a day?

A. About six or seven each way.

Q. How long does it take a train to move from Rices Point to the furnace yard?

A. That depends on the amount of work.

Q. In a case of this kind, where there are no cars switched out,

A. From forty-five minutes to an hour, I presume.

Q. You say how many are moved in a day?

A. Six or seven.

Q. In each direction?

A. Yes.

Q. Are you familiar with the operation of the air brakes, and the time necessary to couple up the air?

A. Reasonably so.

Q. How long does it take to couple up the air[br'kes] on a string of forty-eight cars?

A. It would take two men probably thirty minutes.

Q. How long would it take to pump up the air?

A. That would depend upon how many leaks there were.

Q. Assuming the equipment is in good condition.

A. On forty-five to forty-eight cars, do you say—it would perhaps take twenty minutes.

Witness excused.

G. W. Atmore, called as a witness for the defendant, and being first duly sworn, testified as follows, to wit:

Examination in chief by Mr. Evans:

Q. Where do you live?

A. Duluth.

Q. What is your business?

[—] Assistant superintendent of the Northern Pacific Railway, in charge of the terminals at Duluth and Superior.

Q. Are you in charge of this particular stretch of track that we have been talking about—the Duluth Terminal?

A. Yes.

Q. And you are in charge of the switching operations then in these various switching yards?

A. Yes.

Q. How long have you been in the railroad business?

A. Thirty-four years.

Q. And have you worked for a number of different railroads?

A. Well, in my younger days, several—

Q. In recent years?

A. In recent years I have worked for the Atchison, Topeka & Santa Fe, and the Northern Pacific.

Q. When you were with the Atchison, Topeka & Santa Fe, what line of work were you engaged in?

A. I had charge of the terminal at Kansas City.

Q. Is that a large terminal?

A. Yes.

Q. One of the largest in the country?

A. There is more trackage than at Duluth, but the Northern Pacific has a larger yard terminal than Kansas City.

Q. How long have you been employed by the Northern Pacific?

A. Six years the 12th of this month.

Q. How long have you been assistant superintendent?

A. Six years the 12th of this month.

Q. I want to avoid repetition as much as possible; you have been here during the time that this system of switch tracks has been developed, have you?

A. Yes.

Q. That was originally the only track running from River Point yard down through this district toward the furnace?

A. When I took charge in July, 1912, there was three tracks at the Zenith furnace, on that old D. T. track, that is. There was no Berwind yard, and no Boston yard, and there were only I think, three tracks, then the Boston yard, four tracks.

Q. The development has taken place in the last few years?

A. The last four years.

Q. There is a question here in regard to the number of these transfers, as they have been called.

A. The number operated is about four each way, between Duluth and the Zenith furnace district.

Q. And how is it in busy times, in the fall and winter?

A. Take the fall and winter—we operated from eight and up.

Q. From eight up—each way?

A. Yes.

Q. How high up?

A. That depends on the business, it will go as high as ten or twelve.

Q. What do you say, if anything, would be the result of using the air in these transfer trains. State the practical result from adopting that standard.

[Q.] It would be necessary to increase the working force—the switch engine force. At present we have one engine, and the number would have to be increased to four.

Q. Would it mean greater congestion so far as switching engines are concerned?

Q. A. It certainly would; the more engines on that piece of track to distribute the traffic, the more congestion.

Q. Would it be practical to operate that system of switch tracks, using air in that way, without increasing the number of tracks?

A. No, sir.

Q. What other objections are there to the use of air on these trains?

A. In the first place we have quite a mixed equipment to handle. There are a great many ore cars—and coal cars, sandwiched in with ordinary freight cars, and we have got to use dummy hose—that is a short hose, extending to another car—coupled between two cars. We have a great many of these in the fall of the year, and winter, especially, and it would take a considerable amount of this dummy hose, and a great deal of time to procure this hose. We have them at a certain place, and we have to go back to this place, get this hose, and get back to the place where it is necessary to use it. It would take a long time to pump up the air, and to couple up that dummy hose—thirty to forty-five minutes for fifty cars. Then it is quite a difficult matter to keep these hoses quite dry.

Q. How long does it take to couple up the air?

A. Thirty minutes to three-quarters of an hour, or possibly an hour.

Q. If there are fifty cars?

A. Yes.

Q. How fast are these transfers operated on this track?

A. I have never seen them run over eight miles an hour.

Q. What is the reason for doing that?

A. To comply with the yard limit rule. They must operate under control within sight of vision, for the reason that they go in opposite directions.

Q. Suppose a transfer is going from the furnace yard up to Rices Point, passes a track occupied by some other train, does this transfer have to use any of these other tracks?

A. They do before entering on the side tracks in this subyard.

Q. Then a transfer goes on any other track if it is open?

A. Yes.

Q. As to the question of safety, or danger, in operating, what has your experience been as to whether or not you have had accidents arising out of the failure to use the air?

A. Since my jurisdiction in 1912, we have had no accidents—July, 1912.

Q. About this rock cut—could you see through it?

A. Yes, clearly.

Q. Did you look through it yesterday?

83 A. Yes, with you on the engine which you had for that purpose.

Q. What is the ordinary way of having switches on the [switch] lead?

A. Keep them lined for the lead.

Q. Is there any difference between the way switches are lined up on switch leads in Rices Point yard from the way they are lined up for this middle yard?

A. In the Rices Point yard they are left as they use them. The switches on this line leading between Rices Point yard to the furnace yard are left for the lead.

Q. There was some testimony here about some of the switches being locked, I believe; what have you to say?

A. Well, I know they were, some of them. I could not say exactly which, although there are a few of them I think out there that is locked.

At this point a recess was taken.

Proceedings resumed.

Cross-examination of W. G. Atmore by Mr. WALTERS:

Q. Are these transfer engines engaged exclusively in hauling transfers between these two points—Rices Point and the furnace yard?

A. No, not all of the time.

Q. What do they do the rest of the time?

A. Switch in the yard.

Q. Making up the transfers?

A. No, sir.

Q. What are they doing generally when switching in the yard?

The COURT. Switching in Rices Point yard?

The WITNESS. They are down there between the furnace yard and intermediate points.

By Mr. WALTERS:

Q. What do they do?

A. Their duties are various. These transfers are made up on an [assigned] track, and the switching is in and out of both ends of that track.

Q. Do they use these engines for hauling these transfers after they are made up for Rices Point, or are they used for making up transfers?

A. Yes.

Q. Then what does the engine do after that transfer is taken to Rices Point yard?

A. They occasionally go into the Zenith to assist the yardmaster in that division.

Q. I understood you to say that one engine would work in the Zenith district and another on the dock.

84 A. As I said, the engines work out at each end, go on the track, both ends of it, and after that track was filled, stop at another until some one wanted the engines to get a load at the dock or in the Zenith yard district.

Q. What was it about one of these engines making up transfers?

A. No, sir. These engines are assigned to do certain work in certain districts.

Q. Did you say there are so many engines assigned to work, I think, at Rices Point yard?

A. Yes.

Q. How many engines are assigned to do that work? Well, at present we have a light engine, on what we designate as the deep end of the lead, that is the far end of the body. There are two engines working up there; they are the "hump" and the light engine; then we have what we call a shovel track engine.

Q. At Rices Point?

A. Yes.

Q. Where is that shovel track at Rices Point?

A. It runs along to the centre, and down to the body of the yard.

Q. Are there any engines in Rices Point, used in switching around the yard?

A. Yes; do you want the names of them?

The COURT. Don't bother with the names. We want to know how many there are.

The WITNESS. Let's see—I think sixteen engines, days.

Q. (By Mr. WALTERS.) This is thirteen in addition to the three that you refer to?

The COURT. You say thirteen, in addition to the three that you described?

The WITNESS. Yes, sir.

By MR. WALTERS:

Q. Then it seems there are about sixteen of these engines that work in the Rices Point yard.

A. Not all in the Rices Point yard, no, sir.

Q. What I am trying to get at is the exact number. Didn't I understand you to say they are assigned to work——

A. They are in the yard district, the Zenith district, and the other points outside of the fifty-five tracks which comprise the Rices Point yard.

Q. They are sent there, assigned to work exclusively in the Rices Point yard?

A. Yes.

Q. How many are there of these?

85 A. Well, the "hump," the "D&H," the "BB" (or BD?); the "Clarkson," the "Three-spot," this track 4 engine, and two outside engines.

Q. What do you mean by outside?

A. To work outside the body of the yard.

Q. Where do they work?

A. They go everywhere.

Q. What do you mean by everywhere?

A. They go wherever the yardmaster sends them, outside the body of these fifty-five tracks at Rices Point.

Q. Do you have any at the furnace yard?

A. Yes; they were sent to that yard.

Q. Well, that is about eleven.

A. There is the Boston dock engine, two at Fifth [avenue]—four engines, and I think there are two engines at present working in the Zenith district.

Q. That makes about sixteen engines; are there any other engines that work in the district, including the furnace yard, Rices Point yard, and between?

A. No, I think I have named all of them.

Q. How many of these engines do the switching in the furnace yard?

A. There is two others at present located out there.

Q. These are confined to the furnace yard?

A. There is two engines in the Zenith district at the switch at the Berwind coal dock, Island Creek, the Carboline, the Zenith furnace switch, the match factory, and the Imperial, and three or four other industries in that district.

Q. Well, now, are there any other engines that do any work around Rices Point yard, that is, switching, working around there?

A. Yes, switching down at the Boston coal dock.

Q. Are there any others?

A. Not in that district, not between Rices Point and the furnace yard at present.

Q. How many of these engines are engaged in moving transfers between the furnace yard and Rices Point yards?

A. Well, sometimes there will be two or three of these, and sometimes one of these. It depends on the volume business. They take an engine at Rices Point and bring an engine in there, and send them back. Its all governed by the volume of business.

The COURT. Are any engines used exclusively for the transfer work from Rices Point to the furnace yard?

The WITNESS. Not at the present time.

86 The COURT. When the work is voluminous, and you have work enough, then you get so many engines to do the transfer work?

The WITNESS. Yes.

The COURT. Then there is one doing the local work?

The WITNESS. It does occasional switching.

By Mr. WALTERS:

Q. Have you been an engineer?

A. No.

Q. Have you had anything to do with the operation of air brakes on the train?

A. Yes.

Q. In what capacity?

[—] As a brakeman and conductor.

Q. Isn't thirty to forty-five minutes a long time in which to pump up the air?

A. Not under winter conditions.

Q. About how long would you say it takes to couple up the air hose on a string of forty-eight cars?

A. I said about thirty minutes, depending upon the condition of the air dummies, and making connections.

Q. These air dummies; don't they have the air hose connected [—] them?

A. Yes, but they are too short.

Q. How are they operated in connection with each other?

A. They are coupled up, or as I said, when they are sandwiched in there between other equipment, we want dummy hose.

Q. When you don't have air coupled up, how long would you take to couple up air in a string of forty-eight cars?

A. In the winter time not much better than thirty minutes.

Q. With two men?

A. There are not always two men working on them.

Q. Who would do this connecting up on the air-hose?

A. The car repairer.

Q. How many car repairers have you at a time?

A. We only have one at a time.

Q. How many in Rices Point yard?

A. Two.

Q. You spoke of the rock cut—isn't that crossing lower at this end than it is at the other end of the cut?

A. The yard track is not up to the rock-cut: you don't strike that grade along there, probably 400 or 500 feet, or some 800 or 1,000 feet before you get into the rock cut proper.

Q. That is going east?

A. Going east, or coming east, whichever you might say.

Q. How about the [the] grade on the east end of the rock cut, where do you strike the grade?

A. You get the grade at the rock cut, a little this side.

87 Q. Strike it this side of the lead?

A. East of the rock-cut you get the grade.

Q. At the point where you strike the rock-cut, going east, how far can the engineer see in front of him an engine or train going west?

A. He can see completely through the rock-cut.

Q. How far is that?

A. Well, where you strike the cut it is 7,000 feet.

Q. The trains in either direction, in the direction of this rock-cut, are [m'king] rather rapid speed aren't they, in order to attain that grade?

A. In either direction?

Q. Yes.

A. No; a man going in a westerly direction would not be making any speed, because he would be on the descending grade.

Q. My understanding is that the rock-cut is at the top of the grade.

A. No, sir; you pass over the rock cut.

The COURT. Coming out east—assuming the grade is east, where do you reach the summit?

The WITNESS. Right at the easterly end of the rock cut.

The COURT. Strike the grade at the left of the rock-cut?

The WITNESS. You pass close to the left.

By Mr. WALTERS:

Q. Then if it is left from the rock-cut, you have practically left the grade about a mile?

A. There is a curve at the end of the rock-cut, a slight curve after you come out of or go into the cut.

Q. After you go out?

A. Yes.

Witness excused.

Defendant rests.

TESTIMONY FOR PLAINTIFF IN REBUTTAL.

Howard M. Burtsch, called in rebuttal in behalf of the Government, and testified as follows, to wit:

Direct examination by Mr. WALTERS:

Q. Now, take this transfer of forty-eight cars that moved from Rices Point yard to West Duluth. How long did it take two men to couple up air on those 48 cars, say, in September?

88 A. After the train is made up—of course, I don't know the Northern Pacific system of getting air coupled up, but the two railroads I worked on would get a train made up—we had two car inspectors couple the air up immediately in advance of the departure of the train.

Q. About how long?

A. If they were active two men will couple up forty-eight cars in less than fifteen minutes. I have seen it done time and again.

Q. Well, do you know of any condition that existed in respect to these forty-eight cars that would take them longer to couple up the air than fifteen minutes?

A. Why, if these cars were all coupled up it should be done in fifteen minutes easily by two men.

Q. Well, they were all coupled up when you saw them, weren't they?

A. Well, they were all on one track. I wouldn't say they were all coupled.

Q. But if they were coupled up, how long would it take to pump up the air?

A. That depends on the engine. Some of the switch engines have only a nine-inch pump; they are obsolete. Those engines are old; their air-pumps will work very slowly. I have seen the latest model of transfer engines couple an engine on a fifty-car train and in thirty seconds after they coupled they started out with the train—thirty seconds.

Q. Would they have the air pumped up then?

A. It was not pumped, it was being pumped up all the time, just the instant they coupled on it pumped up—started to pump, and with two eleven-inch pumps they can start to move the train in four or five seconds and get out; in five or six minutes the train is fully charged to seventy pounds.

Q. Do you know the kind of engines used by the Northern Pacific?

A. No, I do not. I never noticed the air pump on that 82 engine.

Q. You don't know whether it is an eleven-inch pump or not?

A. No; have a nine-inch pump on those engines.

Q. Well, with a single nine-inch pump, how long would it take?—with forty-eight cars?

A. Well, that would depend on the leaks.

Q. Well, if the equipment was in good condition?

A. In using a nine-inch pump on forty-eight cars?

Q. Yes.

A. Oh, it would take twenty-five minutes, probably.

Q. Winter or summer?

A. Winter or summer.

89 Q. How long will it take in winter?

A. There seems to be more leaks in winter, but if the train line is tight it pumps as quickly in winter as in summer, but usually it takes more time in winter.

Q. Why so?

A. There are more leaks; the hose are frozen and stiff and the couplings are probably not tight and the train men have to go along there and [the] find leaks and tighten them.

Q. Well, making an allowance for this condition, how much time should be repaired to pump the air into a string of forty-eight cars?

A. We allowed twenty minutes to a train crew to get their engine on a train and get out, winter and summer, on the B. & O.

Q. That was in the Chicago Terminal?

A. That was in the Chicago Terminal.

Cross-examination of Howard M. Burtch, by Mr. LYONS:

Q. If two men could couple that train in fifteen minutes, would it take one man thirty minutes?

A. One man ought to be able to do it in less than thirty minutes.

Q. Why, if it takes two men fifteen minutes, couldn't one man do it in thirty minutes?

A. That would depend on the two men, generally one is a poor man.

Government rests.

Defendant rests.

At this point in the case adjournment was taken to 9.30 a. m., July 12, 1917.

MOTION OF PLAINTIFF AND DEFENDANT FOR A DIRECTED VERDICT ON COUNTS 1 AND 2 AND PLAINTIFF'S EXCEPTIONS TO THE COURT'S RULING ON ITS MOTION, ETC.

Proceedings of morning session July 12, 1917, 9.30 a. m.

Mr. LYONS. The defendant at this time moves the court to direct a verdict in its favor on the ground that no violations of the safety-appliance act have been proved, and that the Government has wholly failed to sustain the allegations of counts 1 and 2 of the complaint in regard to violations of the safety-appliance act.

90 Mr. WALTERS. The plaintiff moves the court to direct a verdict in its favor as to counts 1 and 2 of the declaration, with the request that if such motion is denied it be permitted to go [—] to the jury.

Argument by counsel on motions.

The COURT. I think a motion for a verdict for the defendant will be granted on these two counts.

Will you have a verdict on the other counts or consent to judgment on the other counts, Mr. Lyons?

Mr. LYONS. We will consent to judgment on the other counts.

Mr. WALTERS. The Government desires to except to the ruling of the court in denying the motion to direct a verdict in favor of the plaintiff and in directing a verdict in favor of the defendant as to counts 1 and 2 of the allegation.

The COURT. Defendant consents that judgment shall be entered in favor of the plaintiff for \$100 and costs on each of the other counts

of the other cause of action, except the third, which has been dismissed.

Court directs jury to bring in a verdict as above indicated.

Stay of ninety days is entered.

NARRATIVE STATEMENT OF TRIAL, ETC., AND STIPULATION FOR APPROVAL
OF BILL OF EXCEPTIONS.

July 11th and 12th, 1917. Present, Honorable Page Morris, judge, and a jury.

The above-entitled cause of action came on before the court and a jury, at the city of Duluth, in said State, district and division, on the 11th and 12th days of July, 1917. After all of the testimony had been taken, a transcript thereof containing 124 pages, being hereto attached and made a part hereof, defendant, by its attorney, moved the court to direct a verdict in its favor upon counts one and two of the complaint, on the ground that no violations of the safety-appliance act had been proven and that the Government wholly failed to sustain the allegations of counts one and two of the complaint in regard to violations of the safety-appliance act.

Plaintiff, through its counsel, moved the court to direct a verdict in its favor as to counts one and two of the complaint, with the request that if such motion be denied, it be permitted to go to the jury.

The court, after hearing arguments of counsel, directed a verdict for the defendant upon counts one and two of the complaint.

Whereupon the plaintiff duly excepted to the granting of said motion and also duly excepted to the ruling, decision and order of the court denying the plaintiff's motion for a directed verdict upon said counts one and two, which exceptions were duly allowed by the court, and upon the 12th day of July, 1917, judgment was entered in said action upon counts one and two against the plaintiff and in favor of the defendant.

It is hereby stipulated by and between the parties to the above-entitled action that the above bill of exceptions and settled case proposed by the plaintiff may be allowed and signed by the judge of said court as and for a bill of exceptions in said action, and may be filed as a bill of exceptions and settled case of the plaintiff in said action.

Dated January 3, 1918.

C. W. BUNN & D. F. LYONS,
Attorneys for Defendant.

ALFRED JAQUES,
United States Attorney and
Attorney for Plaintiff.

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

The foregoing document having been examined and having been found to contain a full, correct, and complete statement of the testi-

mony introduced and proceedings had at the trial of the action above entitled.

It is hereby allowed and signed as a bill of exceptions and settled case of the plaintiff in said action.

Dated this 5th day of January, 1918.

PAGE MORRIS, *Judge.*

(Endorsed:) Filed in the District Court on January 5, 1918.

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96 PETITION FOR AND ORDER ALLOWING WRIT OF ERROR.

To the honorable District Court of the United States, District of Minnesota, Fifth Division:

The plaintiff in the above-entitled action, feeling himself aggrieved by the judgment rendered and entered in the above-entitled action on the 12th day of July, 1917, comes now by his attorney and petitions your honorable court for an order allowing said plaintiff to prosecute a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit of the United States according to the laws of the United States in that behalf made and provided, and also your petitioner prays that the transcript of all the proceedings in said cause, together with the assignments of error filed herein, be duly authenticated and with the same be sent to the Circuit Court of Appeals.

ALFRED JAQUES,
United States Attorney for the Plaintiff.

ORDER ALLOWING WRIT OF ERROR.

Upon motion of Alfred Jaques, United States attorney and attorney for the plaintiff in the above-entitled cause, and upon the filing of the foregoing petition for a writ of error, and upon the filing of the assignments of error herein,

It is by the court hereby ordered, that the writ of error be, and the same is hereby, allowed, to have reviewed in the United States Circuit Court of Appeals for the Eighth Circuit, the said judgment entered herein on the 12th day of July, 1917.

It is further ordered that all further proceedings in this court be suspended and stayed until the determination of said writ of error.

Dated this 5th day of January, 1918.

PAGE MORRIS, *District Judge.*

(Endorsed:) Filed in the District Court on January 5, 1918.

MAPS

TOO

LARGE

FOR

FILMING

ASSIGNMENT OF ERRORS.

Now comes the plaintiff in the above-entitled cause and files the following assignments of error upon which it will rely in its prosecution of the appeal in the above-entitled cause, bringing up for review the judgment made and entered in said court on the 12th day of July, 1917.

97. 1. That the United States District Court for the District of Minnesota, Fifth Division, erred in refusing to direct a verdict for the plaintiff and against the defendant in said cause upon counts one and two of the complaint herein.

2. That the United States District Court for the District of Minnesota, Fifth Division, erred in refusing to permit the case to go to the jury.

3. That the United States District Court for the District of Minnesota, Fifth Division, erred in directing a verdict for the defendant and against the plaintiff, upon counts one and two of the complaint, for the reason that the same is contrary to the evidence introduced herein.

4. That the United States District Court for the District of Minnesota, Fifth Division, erred in ordering judgment for the defendant and against the plaintiff upon counts one and two of the complaint, for the reason that the same is contrary to law.

Wherefore, plaintiff asks that said judgment be reversed, and that said District Court for the District of Minnesota, Fifth Division, be ordered and directed to enter judgment in favor of the plaintiff, or to grant a new trial of said cause.

ALFRED JACOBS,

United States Attorney and Attorney for Plaintiff.

(Endorsed:) Filed in the District Court on January 5, 1918.

WRIT OF ERROR AND CLERK'S RETURN.

UNITED STATES OF AMERICA, vs.

The President of the United States of America, to the honorable judges of the District Court of the United States for the District of Minnesota, Fifth Division, greeting:

Because, in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court, before you, at the July Term, 1917, thereof, between The United States of America, plaintiff, and Northern Pacific Railway

Company, defendant, a manifest error hath happened, to the great damage of the plaintiff, the United States of America, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and pro-

ceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 5th day of March, A. D. 1918, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 5th day of January, A. D. 1918. Issued at office in Duluth, Minnesota, with the seal of the District Court of the United States for the District of Minnesota, Fifth Division.

CHARLES L. SPENCER,
*Clerk of the District Court of the United States
 of America for the District of Minnesota.*
 By E. CATHERINE NEFF, Deputy.

Seal U. S. Dist. Court, Dist. of Minn., Fifth Division.
 Allowed by Page Morris, judge.

UNITED STATES OF AMERICA,
District of Minnesota,
Fifth Division, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled cause, with all things concerning the same.

99 In witness whereof, I hereto subscribe my name and affix the seal of the District Court of the United States for the District of Minnesota.

CHARLES L. SPENCER,
*Clerk of the District Court of the
 United States of America for
 the District of Minnesota.*

By E. CATHERINE NEFF, Deputy.

(Seal U. S. Dist. Court, Dist. of Minn., Fifth Division.)

CITATION AND ADMISSION OF SERVICE.

THE UNITED STATES OF AMERICA, PLAINTIFF,
 vs.
 NORTHERN PACIFIC RAILWAY COMPANY, DEFENDANT.

To the Northern Pacific Railway Company, defendant above named:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit of the United States, at the city of St. Louis, Missouri, sixty days from and

after the date this citation bears date, pursuant to a writ of error filed in the clerk's office of the United States District Court, District of Minnesota, Fifth Division, wherein—The United States of America is plaintiff in error and the Northern Pacific Railway Company is defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error and in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Page Morris, judge of the United States District Court, this 5th day of January, 1918.

PAGE MORRIS,
District Judge.

Due service of the foregoing citation and receipt of copy thereof is hereby admitted this 8 day of January, 1918.

C. W. BUNN & D. T. LYONS,
Attorneys for Defendant in Error.

(Endorsed:) Filed in the District Court on January 11, 1918.

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PRECIPICE FOR TRANSCRIPT.

To the Honorable Charles L. Spencer, clerk of the above entitled court:

Now comes the United States of America, plaintiff in error in the above-entitled cause, and files this, its written designation of the parts of the record herein necessary for the consideration of the errors assigned in this cause, as shown by the assignments of errors heretofore filed by the plaintiff in error with its petition for a writ of error, and designated as the parts of said record to be included in the transcript of the record and proceedings to be sent to the United States Circuit Court of Appeals for the Eighth Circuit under the writ of error and the order allowing the same heretofore issued and filed herein the following:

1. All record entries made in this cause.
2. Complaint.
3. Answer.
4. Judgment.
5. Settled case.
6. Petition for writ of error.
7. Assignments of error.
8. Order allowing writ of error.
9. Writ of error.
10. Citation.
11. Designation of parts of record necessary to consideration of errors assigned by plaintiff in error, together with acceptance of service thereon.
12. Defendant's Exhibit "A" and plaintiff's Exhibit "1."

ALFRED JAQUES,

United States Attorney and Attorney for Plaintiff.

(Endorsed:) Filed in the District Court on February 7, 1918.

To CHARLES L. SPENCER,

Clerk of the above entitled court:

Now comes the United States of America, plaintiff in error in the above entitled cause, and files this, its written Notice of Election to have the record printed under the supervision of the clerk of the Circuit Court of Appeals.

ALFRED JAQUES, *United States Attorney.*

(Endorsed:) Filed in the District Court on January 26, 1918.

CLERK'S CERTIFICATE TO TRANSCRIPT.

United States District Court, District of Minnesota,
Fifth Division.

I, Charles L. Spencer, Clerk of said District Court, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing, consisting of 148 pages, numbered consecutively from 1 to 148, inclusive, is a true and complete transcript of all the records, process, pleadings, orders and final judgment and all other proceedings in said cause and of the whole thereof, as appears from the original records and files of said Court and in accordance with the practice for such transcript, a copy of which is included within said paging; and I do further certify and return that I have annexed to said transcript and included within said paging the original writ of error, and the original citation together with admission of service thereof.

In witness whereof, I have hereunto set my hand as the clerk aforesaid and affixed the seal of said court at Duluth, in the District of Minnesota, this 2nd day of March, A. D. 1918.

CHARLES L. SPENCER, *Clerk,*
By E. CATHERINE NEFF, *Deputy.*

(Seal U. S. Dist. Court, Dist. of Minn., Fifth Division.)

Filed Mar. 4, 1918. E. E. Koch, clerk.

102 And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

APPEARANCE OF MR. ALFRED JAQUES AS COUNSEL
FOR PLAINTIFF IN ERROR.

United States Circuit Court of Appeals,
Eighth Circuit.

THE UNITED STATES OF AMERICA, plaintiff in error,

vs.

No. 5115.

NORTHERN PACIFIC RAILWAY COMPANY.

The clerk will enter my appearance as counsel for the plaintiff in error.

ALFRED JAQUES, *U. S. Attorney.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 8, 1918.

APPEARANCE OF MR. ROSCOE F. WALTER AS COUNSEL
FOR PLAINTIFF IN ERROR.

The clerk will enter my appearance as counsel for the plaintiff in error.

ROSCOE F. WALTER.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, April 29, 1918.

103 APPEARANCE OF COUNSEL FOR DEFENDANT IN ERROR.

The clerk will enter my appearance as counsel for the defendant in error.

C. W. BUNN,
D. F. LYONS,

Law Dept., N. P. Ry. Co., St. Paul, Minn.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, April 29, 1918.

ORDER OF ARGUMENT.

December Term, 1918.

WEDNESDAY, December 4, 1918.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Roscoe F. Walter, special assistant to the United States attorney, for plaintiff in error, and the hour for adjournment having arrived further argument was postponed until tomorrow.

ORDER OF SUBMISSION.

December Term, 1918.

THURSDAY, December 5, 1918.

This cause having been called for further hearing, argument was resumed by Mr. Roscoe F. Walter, special assistant to the United States attorney, for plaintiff in error, continued by Mr. D. F. Lyons for defendant in error and concluded by Mr. Roscoe F. Walter for plaintiff in error.

104 Thereupon, this cause was submitted to the court on the transcript of the record from said District Court and the briefs of counsel filed herein, and if it is deemed advisable the same will be submitted on the record and briefs to a third judge.

United States Circuit Court of Appeals, Eighth Circuit.

No. 5115.—December term, A. D. 1918.

UNITED STATES OF AMERICA, PLAINTIFF IN
error,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, DEFENDANT IN ERROR.

In error to the District Court of the United States for the District of Minnesota.

Mr. Roscoe F. Walter, special assistant to the United States attorney (Mr. Alfred Jaques, United States attorney, was on the brief with him), for plaintiff in error.

Mr. D. F. Lyons (Mr. C. W. Bunn was on the brief with him) for defendant in error.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

TRIEBER, District Judge, delivered the opinion of the court.

The plaintiff in error, plaintiff in the court below, seeks a reversal of a judgment in favor of the defendant railway company, entered on a directed verdict of a jury.

There are two counts involved, each of them complaining of a violation of the safety appliance act of March 2, 1893, 27 St., 531, as amended and supplemented by the acts of April 1, 1896, 29 St., 85; March 2, 1903, 32 St., 943; and April 14, 1910, 31 St., 298. The first count charges that the defendant on September 21, 1916, operated a transfer train of 48 cars over its interstate line of railroad in and about Duluth, Minn., when less than 85% of the cars in said train had their air brakes used and operated, or so assembled and connected that they could be used and operated by the engineer of the locomotive drawing the train. The second count charged a similar violation in the operation of a transfer train of 40 cars on September 22, 1916.

The only issue involved is whether the tracks over which these trains were operated were a part of defendant's interstate line of railroad or merely side tracks used for switching purposes only. In *United States v. Erie Ry. Co.*, 237 U. S., 402, it was held: "A train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up and is proceeding on its journey it is within the operation of the air-brake provision. But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains which have completed their run are broken up. These are not train movements but mere switching operations, and so are not within the air-brake provision."

The court in that case found the facts to be that the trains complained of were made up in yards like other trains and then pro-

ceeded to their destinations over main line tracks used by other freight trains, both through and local. The court in its opinion said: "They were not moving cars about in a yard or on tracks set apart for switching operations, but were engaged in main line transportation, and this in circumstances where they had to pass through a dark tunnel, over switches leading to other tracks, and across passenger tracks whereon trains were frequently moving. Thus it is plain that, in common with other trains using the same main line tracks, they were exposed to hazards which made it essential that appliances be at hand for readily and quickly checking or controlling their movements," and it was held that they were subject to the provisions of the act.

In *United States v. Chicago, Burlington & Quincy R. R.*, 237 U. S., 410, the facts found were: "The defendant operates a railroad which passes through Kansas City, Missouri, and is used largely in interstate commerce. Among its terminal facilities at that point are two freight yards known as the Twelfth Street yard and the Murray yard. These yards are on opposite sides of the Missouri River, the distance between their nearest points being about two miles. The track connecting them is one by which passenger and freight trains enter and leave the city; in other words, a main line track. For a distance of 3,000 feet it is upon a single-track bridge spanning the river, and off the bridge it intersects at grade twelve or fifteen tracks of other companies and passes through the Union Depot tracks. Besides its use by the defendant's trains, a considerable portion of it is also the line by which the passenger trains and some of the freight trains of the Rock Island and Wabash Railroads enter and leave the city.

Both yards are used for receiving and breaking up incoming trains, assembling and starting outgoing trains, and assorting, storing, and distributing cars. To reach their ultimate destinations, whether on the defendant's road or on those of other carriers, a large proportion of the cars have to be moved from one yard to the other, and this is accomplished by transfer trains which are run over the main-line track connecting the yards. These trains usually consist of an engine and about thirty-five cars, are operated by what are termed yard or switching crews, and carry no caboose or markers. They have no fixed schedules and are not controlled by a train dispatcher, but by block signals, as are all other trains moving over the same track. Each train is moved as a unit from one yard to the other and not infrequently is both preceded and followed by other trains, passenger and freight.

"The three trains, the running of which is charged to have been violative of the statute, were transfer trains of the class just described. They were run from one yard to the other on August 9, 1910, and were composed, respectively, of 42, 36, and 39 cars, of which only 9 in one train and 10 in each of the others had their air brakes connected for use by the engineer. At that time air brakes were required to be used on 75 per cent of the cars in a train. 11

L. C. C., 429, 437," and the court held that as the trains were engaged "not shifting cars about in a yard or on isolated tracks devoted to switching operations, but moving traffic over a considerable stretch of main-line track—one that was a busy thoroughfare for interstate passengers and freight traffic. Every condition suggested by the letter and spirit of the air-brake provision was present. And not only were these trains exposed to the hazards which that provision was intended to avoid and minimize, but unless their engi-

neers were able readily and quickly to check or control their 4 movements they were a serious menace to the safety of other trains which the statute was equally designed to protect," and it was held that upon these facts they were trains in the sense of the statute.

The undisputed evidence in this case establishes the fact that neither of the trains was operated on the dates alleged with 85 per cent of air brakes, and that the tracks over which they were operated were not main tracks, but tracks used for switching purposes only.

Owing to the topographical conditions at Duluth, it is necessary that the yard and industrial tracks be confined to a narrow space, and the terminals at Duluth are, owing to the many industries and the large shipping there, necessarily very extensive in length. Duluth is the largest terminal on that railway. At Rices Point there are fifty-five tracks, each 4,000 feet long. The main tracks, over which all trains not used for switching purposes exclusively are operated, are north of the tracks over which the trains in controversy were operated. Along these switch tracks there are a number of yards, among them Rices Point yard and Furnace yard, all termed "Duluth terminals," and commonly referred to as "D. T. tracks." It was between these two yards the trains mentioned in these two counts were operated without having 85 per cent of its cars equipped with air brakes.

At one of the points this track crossed the tracks of the Duluth, Winnipeg & Pacific Railroad, which is used by that road for freight trains moving through West Duluth to Superior, Wis. Further east this track crosses the tracks of another line, which are used for general traffic. It also crosses a track of the Duluth, Missabe & Northern R. R. The yards along this "D. T." track are all operated as one yard. There are no train orders, time cards or block signals giving the movement of cars along this track, and no train has the right of way over any other train; they are all operated at a slow speed, so that they may be stopped within vision. No freight or passenger trains, either local or through, ever use any part of these "D. T." tracks. The book of rules of the defendant railway company, which governs the operation of the railway, defines the meaning of a main line or main track: "A track extending through yards and between stations, upon which trains are operated by time-table or train order, or the use of which is controlled by block signals."

5 The undisputed testimony also establishes the fact that no part of any of these tracks is ever used by any of the trains

running between stations, freight or passenger, but that they are used exclusively for switching purposes to supply the industries along these tracks with loaded cars or empties to be loaded for outgoing freight for delivery to the main line.

From these facts no other conclusion can be reached than that of the learned trial judge that these train movements were mere switching operations, and therefore not within the air-brake provision of the act of Congress, as determined in the Erie and Chicago, Burlington & Quincy, Railroad cases, *supra*.

The district court committed no error in directing a verdict on these counts for the defendant, and its judgment is affirmed.

Filed January 15, 1919.

110

JUDGMENT.

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1918.

Wednesday, January 15, 1919.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
NORTHERN PACIFIC RAILWAY COMPANY.

No. 5115.

In error to the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this court.

January 15, 1919.

111

CLERK'S CERTIFICATE.

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Minnesota, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, and full, true, and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United

States, in a certain cause in said Circuit Court of Appeals where The United States of America was plaintiff in error and the Northern Pacific Railway Company was defendant in error, No. 5115, as full, true, and complete as the originals of the same remain on file and record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this twentieth day of March, A. D. 1919.

[SEAL.]

E. E. KOCH,

*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

112 In the Supreme Court of the United States, October Term, 1918.

THE UNITED STATES

v.

No. 949.

NORTHERN PACIFIC RAILWAY COMPANY.

STIPULATION AS TO RETURN TO WRIT OF CERTIORARI.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit to the writ of certiorari granted therein.

ALEX. C. KING,

Solicitor General.

C. W. BUNN,

Counsel for Respondent.

MAY, 1919.

(Endorsed:) No. 5115. United States of America, Plff. in Error, vs. Northern Pacific Railway Company. Stipulation as to return to writ of certiorari. Filed May 5, 1919, E. E. Koch, clerk.

113 UNITED STATES OF AMERICA, *et al.*

*The President of the United States of America, to the honorable
the judges of the United States Circuit Court of Appeals for the
Eighth Circuit, greeting:*

Being informed that there is now pending before you a suit in which The United States of America is plaintiff in error, and Northern Pacific Railway Company is defendant in error, No. 5115, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Minnesota, and we, being willing for certain reasons that

the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into
 114 the Supreme Court of the United States, do hereby command
 you that you send without delay to the said Supreme Court,
 as aforesaid, the record and proceedings in said cause, so that the said
 Supreme Court may act thereon as of right and according to law
 ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the
 United States, the twenty-eighth day of April, in the year of our
 Lord one thousand nine hundred and nineteen.

[SEAL.]

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

115

RETURN TO WRIT.

UNITED STATES OF AMERICA,

Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in
 pursuance of the stipulation of the parties, a full, true, and complete
 copy of which is hereto attached, I hereby certify that the transcript
 of record furnished with the application for a writ of certiorari in
 the case of The United States of America, plaintiff in error, v.
 Northern Pacific Railway Company, No. 5115, is a full, true, and
 complete transcript of all the pleadings, proceedings, and record en-
 tries in said cause as mentioned in the certificate thereto.

In testimony whereof I hersunto subscribe my name and affix the
 seal of the United States Circuit Court of Appeals for the Eighth
 Circuit, at office in the city of St. Paul, Minnesota, this sixth day of
 May, A. D. 1919.

[SEAL.]

E. E. KOCH,

*Clerk of the United States Circuit Court
 of Appeals, Eighth Circuit.*

(Endorsed:) File No., 27035. Supreme Court of the United States.
 No. 949, October term, 1918. The United States of America vs.
 Northern Pacific Railway Company. Writ of certiorari. Filed May

5, 1919. E. E. Koch, clerk.

116 (Endorsed:) File No., 27035. Supreme Court U. S., Octo-
 ber term, 1918. Term No., 949, The United States, P. E., vs.
 Northern Pacific Ry. Co. Writ of certiorari and return. Filed May
 10, 1919.



In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE UNITED STATES, PETITIONER, }
v. } No. —.
NORTHERN PACIFIC RAILWAY COMPANY.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT AND BRIEF IN SUPPORT.**

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Eighth Circuit rendered in the above-entitled case January 15, 1919, which judgment affirmed a judgment of the District Court adverse to the Government.

QUESTION INVOLVED.

The question involved is whether the requirements of the Safety Appliance Act that all trains used on any railroad engaged in interstate commerce shall have operative power brakes on a certain percentage of the cars are applicable to transfer trains moving between two yards of a railroad company.

THE FACTS.

The railroad company maintains at Duluth, Minn., an extensive terminal. Within its limits are several yards, two of which (Rice's Point Yard and Furnace Yard)-are about four miles apart. The Government charges in this case that the Safety Appliance Act was violated by the movement of two trains, one consisting of 40 cars and the other of 48 cars, between these two yards. In each instance the cars were assembled into a train from various industries around one of the yards. An engine was then attached and the train moved to the other yard, a distance of about four miles. In neither case was the requirement of the law as to airbrakes complied with. The train was moved at a speed ranging from 3 to 18 miles per hour. In making the trip from one yard to the other, it crossed the tracks of several railroad companies and passed over two street crossings, one of which was used by street cars. After being transferred, the train was broken up in the second yard and the cars delivered to different connecting carriers or placed in other trains of the defendant. The track over which these trains moved directly connects the two yards. It is not used by the defendant as a main line for through freight or passenger service. About $1\frac{1}{2}$ miles of it, however, is used by the Duluth, Missabe & Northern Railroad for freight trains, and it is also used by the Duluth & Mineral Range Railroad for log trains making a speed of from 12 to 15 miles per hour.

HOLDING OF THE COURT BELOW.

The Circuit Court of Appeals took the view that the Act in question applied only to trains being operated on the main line, saying:

The only issue involved is whether the tracks over which these trains were operated were a part of defendant's interstate line of railroad or merely side tracks used for switching purposes only.

REASONS FOR GRANTING THE WRIT.

Upon the facts stated, the movements of the train in question were not mere switching movements, but constituted the running of trains from one yard to the other, and the holding of the Circuit Court of Appeals is therefore contrary to what was held by this Court in *United States v. Erie Railroad Co.*, 237 U. S. 402, and *United States v. Chicago, Burlington & Quincy Railroad Co.*, 237 U. S. 410. The question is one of great importance, for the reason that until it is settled the duties of railroad companies in this regard at nearly every large city in the country are left in uncertainty. In addition, a review of the judgment in this case is necessary and proper to harmonize conflicting views held by the courts in different circuits.

The holding in this case resulted from a misinterpretation of the two cases cited above decided by this court. It is in conflict with the interpretation of those cases adopted by the Circuit Court of Appeals for the Fifth Circuit in the case of *United States v. Galveston, Houston & Henderson Railroad Co.*, de-

cided February 8, 1919. The opinion of the court in that case has not been published, but a copy thereof is printed as an appendix hereto.

BRIEF IN SUPPORT OF THE PETITION.

The cases of *United States v. Erie Railroad Company*, 237 U. S. 402, and *United States v. Chicago, Burlington & Quincy Railroad Co.*, 237 U. S. 410, would seem to settle beyond controversy that the act in question applies to a train made up in one yard while it is being moved from that yard to another yard of the same company. But because in the opinions in those cases the court incidentally stated the fact that the trains there involved were moved over a main line the court below in this case has been misled into attaching undue importance to that fact. In the cases referred to this Court distinguished between operations in the yard necessary to assemble the cars into trains or to break up trains from the movement of trains after once made up and said:

When a train is thus made up and is proceeding on its journey it is within the operation of the air-brake provision. (237 U. S. 407-408).

In the present case the train was made up in one of the yards. It is not insisted that the air-brake provision was required to be complied with during the switching operations necessary to make up the train. But the train was being made up preparatory to a journey, and that journey was to be from the yard in which it was made up to another yard some four miles away. When the engine was attached

and the train started over the track connecting the two yards, it was proceeding on its journey within the meaning of the cases cited. There is, we think, nothing in what has been said by this Court which justifies attaching any importance to the fact that the particular track on which the train was run was not what the defendant called a main line. It was the track which the company used for the operation of trains between its two yards. If to make it necessary to comply with the air-brake provision the train must be on what is in any sense a main line, then this track was a main line for the movement and operation of trains between the two yards.

The conditions at Duluth are practically the same that exist at all points throughout the country where railroads have more than one yard connected by tracks. The law of the case is therefore of general application and of sufficient importance to make it proper for this Court to finally and definitely settle the question involved. Moreover, the judgment of the court below is in conflict with the holding of the Circuit Court of Appeals for the Fifth Circuit, as shown by the opinion printed as an appendix hereto. For these reasons it is submitted the writ of certiorari should issue.

Respectfully,

ALEX. C. KING,

Solicitor General.

WILLIAM L. FRIERSON,

Assistant Attorney General.

MARCH, 1919.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

No. 3196.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

GALVESTON, HOUSTON & HENDERSON RAILROAD COMPANY,
DEFENDANT IN ERROR.

In error to the District Court of the United States for the
Southern District of Texas.

Before Walker and Batts, Circuit Judges, and Grubb,
District Judge.

Walker, Circuit Judge:

This was an action for the recovery of penalties for alleged violations of the air-brake provision of the Safety Appliance Act. 32 St. L. 943. The petition contained four counts, the first of which, after setting out the order of the Interstate Commerce Commission promulgated June 6, 1910, and becoming effective September 1, following, which had the effect of increasing the minimum number of cars whose train brakes must be under the engineer's control to 85 per cent., alleged that the defendant (defendant in error here), "on March 28, 1917, operated on its line of railroad one train, to-wit: its own transfer consisting of 57 cars, drawn by locomotive engine G. H. & H. No. 13, said train being one operated with power or train brakes over a part of a highway of interstate commerce."

Plaintiff further alleges that on said date defendant operated said train as aforesaid over its line of railroad, in and about Galveston, in the State of Texas, within the jurisdiction of this Court, when none of said cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, and when less than 85 per cent of the cars which composed said train had their brakes used and operated or so assembled and connected that they could be used and operated by the engineer of said locomotive engine drawing said train.

The averments of each of the other counts were the same, except that they averred the operation on March 29, 1917, March 30, 1917, and March 31, 1917, respectively, of trains consisting of 43, 31, and 49 cars, respectively. The evidence adduced showed that each of the movements testified to of an engine with the alleged number of cars attached was within the area of the strip of land on the northern side of Galveston Island, extending eastwardly a distance of about 5 miles from a station a short distance east of a bridge connecting the western end of the island with the mainland, over which the trains of several railroads pass in going to or from Galveston. That area is traversed by a number of city streets and by a multitude of tracks belonging to and used by different railroads and the Galveston Wharf Company, a connecting carrier between the railroads entering Galveston and the wharves along the city's water front. Evidence offered in support of the first count showed the following state of facts:

Defendant's locomotive No. 13, having 57 cars attached, pushed them in an easterly direction from what is known as defendant's Old West Yard to the East Yard of the Galveston Wharf Company, a distance of four miles. In so doing it crossed at grade a number of the city's streets which were open for traffic and were in use, also the main-line tracks of several other railroads, over which a number of trains pass daily, and used about 400 feet of a track which is the passenger main track in daily use for interstate trains of the defendant and two other railroad companies. At another place it used about 100 feet of the defendant's main line. It passed through two interlocking plants, one at 51st Street and the other farther east at 36th Street, the former of which is so constructed that when a train is using one of the tracks

within the plant, another train cannot use such track, being prevented from doing so by a derailing device, while the latter is not equipped with the device mentioned. In the movement the east-bound main track of the Galveston Wharf Company was used for a distance of about one and one-half miles. In making the movement cars were set out at two places, 8 cars at one place and 16 cars at another. Evidence offered in support of the other counts showed similar states of fact, the principal differences being in the number of cars moved, and that the evidence offered to support the second count showed that the distance moved was about 3.4 miles and no cars were set out before the movement ended; that the evidence offered to support the third count did not show the exact distance, but disclosed that it was several miles, and showed that all the cars were pushed to where the movement stopped except one which became defective en route and was set out at what was called the Middle Yard; and that the evidence offered to support the fourth count showed that the distance moved was about 3.8 miles, and that cars were set out at two places, 15 cars at the Middle Yard and 22 on a track of the Galveston Wharf Company. Each movement was made without having the air coupled up between the engine and the cars moved, and none of the cars moved had their brakes used and operated by the engineer of the locomotive to which the cars were attached. At the times of the movements in question the defendant was a common carrier engaged in interstate commerce by railroad. Each of the transfers contained interstate freight. The engine was known as a switch or yard engine. Its crew was known as a yard crew. The movements and the tracks used in them were under the control of the yardmaster. The speed of each of the movements was six to eight or nine miles an hour. There was judgment in favor of the defendant pursuant to a verdict which the court directed.

The record discloses that the action of the court in directing a verdict in favor of the defendant was the result of the conclusion that the movements in question were switching movements, and were not within the meaning of the provision of the statute making it unlawful for a common carrier engaged in interstate commerce by railroad to "run any train" in such traffic without having a sufficient number of the cars so

equipped with power or train brakes that the engineer on the locomotive can control the speed of the train "without requiring brakemen to use the common hand brake for that purpose." We do not think that in any material respect the movements in question were different from those which in two recent cases were held by the Supreme Court to have been such train movements as are prohibited and penalized by the statute. *United States v. Erie Railroad Company*, 237 U. S. 402; *United States v. Chicago, Burlington & Quincy Railroad Company*, *Ib.* 410. In the opinion rendered in the first-cited case the court, in the statement of the grounds relied on to support the conclusion that the movements there in question of transfer trains from Jersey City and Weehawken to Bergen and *vice versa* over tracks of the defendant were not mere switching operations, but were train movements within the meaning of the statute in question, said:

"As the context shows, a train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up and is proceeding on its journey it is within the operation of the air-brake provision. But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains which have completed their runs are broken up. These are not train movements but mere switching operations, and so are not within the air-brake provision." *United States v. Erie R. Co.*, *supra*, 407.

In speaking in the last-cited case of movements which were held to be within the prohibition of the statute, the court said:

"According to the fair acceptation of the term they were trains in the sense of the statute. The work in which they were engaged was not shifting cars about in a yard or on isolated tracks devoted to switching operations, but moving traffic over a considerable stretch of main-line track—one that was a busy thoroughfare for interstate passenger and freight traffic. Every condition suggested by the letter and spirit of the air-brake provision was present. And not only were these trains exposed to the hazards which that provision was intended to avoid or minimize, but unless their engineers were able readily and quickly to check or control their movements they were a serious menace to the safety of the trains which the statute was equally designed to protect. That they carried no caboose or markers is not material. If it were, all freight trains could easily be put beyond the

reach of the statute and its remedial purpose defeated. Neither is it material that the men in charge were designated as yard or switching crews, for the controlling test of the statute's application lies in the essential nature of the work done rather than in the names applied to those engaged in it." *United States v. Chicago, Burlington & Quincy R. Co.*, *supra*, page 412.

The engine and cars, the movements of which are in question in the instant case, were assembled and coupled together for runs or trips, each of a distance of several miles. In those trips they crossed main-line tracks of several railroads and streets at grade, and moved over stretches of main-line track. The movements made were not kept from being runs or trips along the road by the circumstances that the tracks used were part of the network of tracks referred to generally as the Galveston Yards and that main-line tracks were used in only parts of the runs. There was no material difference between the unit formed by the assembling and coupling together of the engine and cars before each of the movements began and a train made up for a run to another station. It cannot properly be said that the movement throughout consisted of operations whereby the previously formed unit was broken up. Nothing occurred while either of the movements was in progress which was materially different from what might have occurred if the movements had been to points beyond the yard limits. A result of each of the movements was that interstate freight was carried over an interstate railway thoroughfare to a point several miles nearer its ultimate destination. The fact that there are switching operations before such a movement is completed does not have the effect of making the entire movement one which does not come within the prohibition of the statute. What was done included more than such shifting of cars while not controlled by the engineer by power or train brakes as properly may be regarded as not forbidden by the statute.

For the reasons above indicated the conclusion is that the court erred in directing a verdict for the defendant. Because of that error the judgment is

Reversed.

(Original Filed February 8th, 1919.)

Office Supreme Court, U. S.
FILED.

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JAMES D. BAHER,
CLERK.

No. 9

In the Supreme Court of the United States

OCTOBER TERM, 1918.

THE UNITED STATES, Petitioner,

v.

NORTHERN PACIFIC RAILWAY COMPANY.

Brief Against the Petition for Certiorari.

CHARLES W. BUNN,

For Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1918.

THE UNITED STATES, Petitioner,

v.

NORTHERN PACIFIC RAILWAY COMPANY.

Brief Against the Petition for Certiorari.

The brief in support of the petition seems to us to state the facts quite imperfectly and to omit those thought by the courts below to be controlling. A correct understanding of the facts will show, as we think, that the decision below follows and is not contrary to what this court has decided and is entirely consistent with the opinion in the Fifth Circuit printed as an appendix to petitioner's brief.

Two transfer movements are in question between points in Duluth known as "Rices Point" and "Furnace." Defendant's exhibit "A" in the transcript shows the geography. The red lines on this map are main tracks. There is shown inside the main track, that is between the main track and the water, extending between "Rices Point" and "Furnace" through points marked "Boston" and "Berwind," a system of switching tracks. Rices Point, Furnace, Boston and Berwind are not stations and freight is not billed from

one of these points to another. They are names used to indicate near-by industries or wharves, except Rices Point, which is the name of a point extending into the Lake. Though one of the transfers in question moved from Furnace to Rices Point without setting out cars, customarily, or at least frequently, they would pick up and set out cars all the way along (Transcript p. 69). Freight cars are never consigned from one point to another within this district, but those picked up go beyond the district, those set out come from beyond the district, the trains being made up and broken at Rices Point. At Rices Point there are 55 tracks each 4,000 feet long. From there to Furnace the number of tracks varies, being 15 at Furnace, 9 at Berwind, and 6 or 7 at Boston (Transcript pp. 65-66). There are many industries and frequent turnout tracks within the district and the whole is operated as one yard (Transcript p. 69). No trains move on schedule, or train orders, or time cards, and there are no block signals, or other signals; no train has the right of way over any other (Transcript pp. 66-67). There is but one operating rule, which is that all trains must move at such speed that they can be stopped within vision (Transcript pp. 67, 72). No passenger trains whatever and no through or local freight trains move on the tracks (Transcript p. 68). For a certain distance a part of the tracks is used by two other railroad companies, one for transferring cars between its docks and the United States Steel Company's plant, some six or eight miles distant, the other for a small movement of logging trains, something like one train a day. But the trains or transfers (whichever they are) of these companies move in this district without train orders,

time cards or signals, and under the one rule of movement by vision (Transcript pp. 50, 70, 71).

By the defendant's book of rules a main line is "A track extending through yards and between stations, upon which trains are operated by time-table or train order, or the use of which is controlled by block signals" (Transcript p. 68). Defendant's rules and practice draw the distinction between train movement and switching movement suggested by the facts we have stated. Defendant understands the tracks in question are not main line tracks; the movements in question not train movements, but switching movements, because occurring off the main tracks in a district assigned to switching where no movements are controlled by schedule orders, or time cards, or block signals, and where all movements have the universal characteristic of switching; viz., visual control.

The facts differentiate the case fundamentally from *United States v. Erie Railroad Co.*, 237 U. S. 402, and *United States v. Chicago, Burlington & Quincy Railroad Co.*, 237 U. S. 410. In the Erie case the movement in question was between two independent yards over intervening main line tracks used by other trains, both through and local (page 408); not on "tracks set apart for switching operations, but were engaged in main-line transportation" (page 408); no cars were switched out of or into these transfers while on their way from one yard to another (p. 406); the yards at Jersey City, Weehawken and Bergen were not so linked together that cars might be moved from one to another with the freedom usual and essential in intra-yard movements, and in actual practice were treated as separate yards (p. 406); each so-called yard was a station at which freight, both local and interstate,

was accepted and delivered as shown in the defendant's tariffs (p. 404); the transfers moved over the same line on which "fifteen regular through and local freight trains are moved each day" (p. 405).

In the Burlington case the movement was between two freight yards on opposite sides of the Missouri river over a main line track connecting them, which was a track by which passenger and freight trains entered and left the city (p. 411); each train was moved as a unit from one yard to the other without switching on the way, and not infrequently was both preceded and followed by other trains, passenger and freight (p. 412).

The matter of controlling importance in both decisions is that the movement was over main line; that is, line on which trains are operated at high speed under train orders, or time schedule, or block signal. On such tracks certain trains by virtue of their orders or time cards have the right of way and consequently move at high speed. On the contrary, trains are required in the district in question to proceed under control; this is the one rule of operation that the engineer must be ready and able to stop at any place. He protects himself and looks to see whether any track is in use.

The similarity between this case and *United States v. Galveston, Houston & Henderson Railroad Company* (appendix to petitioner's brief) lies in the fact that the movement in each case was about the same distance. There similarity ceases. In the Galveston case the train passed over two sections of main passenger line in daily use by trains of the defendant and two other railroad companies; and through two interlocking plants.

The petitioner's brief presents the thought of one of the witnesses for the Government, that air control ought to be required because the tracks in question crossed two public streets, one used by street cars, and crossed sev. railroad tracks. But this amounts to saying that switching ought not to be carried on across public streets or over railroad crossings; which, to say the least, is something that Congress has not said. The testimony showed that the crossings were protected by requiring arbitrary stops; a usual and characteristic feature of visual protection.

It was shown that this is a district of constant and frequent switching, somewhere between 15 and 20 switching engines being engaged; and that to use air would mean great delay to business and increase of expense by requiring use of more engines and cars (Transcript pp. 70, 71). It is not intended to suggest that requirements of economy should create exceptions to the law, but only to suggest facts doubtless considered by Congress when it restricted the air brake requirements to *train* movements.

CHARLES W. BUNN,
For Respondent.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES, PETITIONER,
v.
NORTHERN PACIFIC RAILWAY COMPANY, } No. 339.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

This is a suit to recover penalties for alleged violations of the safety appliance act. There was a judgment in favor of the defendant which was affirmed by the Circuit Court of Appeals and the case is here on certiorari.

STATUTES INVOLVED.

The act of March 2, 1893 (27 Stat. 531), provides:

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic * * * that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

An amendment to this act, approved March 2, 1903 (32 Stat. 943), provided that—

the provisions and requirements hereof and of said acts relating to train brakes * * * shall be held to apply to all trains * * * used on any railroad engaged in interstate commerce.

This amendatory act also provided that no less than 50 per cent of the cars in such train shall have their brakes used and operated by the engineer of the locomotive, etc. The Interstate Commerce Commission was authorized to increase the percentage of cars in any such train which must have their brakes so used and operated and in 1910 increased it to 85 per cent.

THE FACTS.

The defendant, which is a railroad company engaged in interstate commerce, has an extensive terminal at Duluth, Minn., which embraces several separate yards. Two of these, known as Rice's Point Yard and Furnace Yard, are about 4 miles apart, connected by a railroad track. This case involves the running of trains between these two yards. The track connecting them is not used by the defendant for its through trains; portions of it, however, are used by the freight trains of the Duluth, Missabe & Northern Railroad and by the Duluth & Iron Range Railroad. Moreover, it crosses tracks used by the Duluth, Winnepeg & Pacific Railroad and by the

Soo Line and the Duluth, South Shore & Atlantic Railroad. It also crosses two streets, one of which is used by street cars. The running of two trains is involved, one containing 40 cars and the other 48. In each instance all of the switching movements necessary to assemble these cars occurred in one yard. The train, thus assembled, was then attached to a locomotive and transferred to the other yard, where it was broken up, no switching operations occurring between the two yards, and no effort being made to comply with the safety-appliance act.

QUESTION INVOLVED.

The question involved is whether the requirements of the safety-appliance act that all trains used on any railroad engaged in interstate commerce shall have operative power brakes on a certain percentage of the cars are applicable to transfer trains moving between two yards of a railroad company.

RULING OF THE COURT BELOW.

The Circuit Court of Appeals said:

The only issue involved is whether the tracks over which these trains were operated were a part of defendant's interstate line of railroad or merely sidetracks used for switching purposes only.

And after reviewing the facts, that court said further:

The undisputed testimony also establishes the fact that no part of any of these tracks is ever used by any of the trains running between

stations, freight or passenger, but that they are used exclusively for switching purposes to supply the industries along these tracks with loaded cars or empties to be loaded for outgoing freight for delivery to the main line. 255 Federal 655, 657, 658.

The court was therefore of opinion that these train movements were mere switching operations and therefore not within the air-brake provisions of the act of Congress "as determined in the Erie and Chicago, Burlington & Quincy Railroad cases." 237 U. S. 402, 410. In effect thus the holding was that the requirements of the act applied only to trains which were being operated between stations, that is, upon the main line of the company operating them.

THE GOVERNMENT'S CONTENTION.

The contention of the Government is that the application of the law does not depend upon whether the train is being run on a track which the company regards as its main line and on which it operates passenger and freight trains running between stations, but depends on whether it is a train being run from one place to another after all the switching operations necessary to assemble the cars into a train have occurred, and that the running of such a train between two yards is just as much within the law as the running of a train between stations on the main line.

BRIEF.

I.

The defendant company operated a railroad and was engaged in interstate commerce.

II.

At its terminal at Duluth it had two yards about 4 miles apart and connected by a railroad track. This track defendant used to transfer trains from one yard to another, but not for the passage of through trains. Portions of it, however, were used by the freight trains of two railroad companies, and it crossed the tracks of three others as well as two streets one of which was used by street cars.

III.

All of the switching operations necessary to assemble the 40 or 48 cars occurred in one yard. The train, thus assembled, was then transferred to the other yard, where it was broken up, no switching operations occurring between the two yards, and no effort being made to comply with the safety appliance act.

IV.

In running this train between one yard and another defendant was using it on a railroad engaged in interstate commerce and the safety appliance act applied. *United States v. Erie Railroad Company*, 237 U. S. 402; *United States v. Chicago, Burlington, & Quincy Railroad Company*, 237 U. S. 410; *Louis-*

ville & Jeffersonville Bridge Company v. United States, 249 U. S. 534; *United States v. Brooklyn Eastern District Terminal*, 249 U. S. 296.

ARGUMENT.

All that the act specifies as necessary to make its requirements applicable is that there shall be a train used by a common carrier engaged in interstate commerce by railroad on its line in moving interstate traffic. There is certainly no express requirement that the train shall be run between stations or on a main line or any particular track or that the track upon which it is run shall be used for the operation of through trains.

When this case was decided by the Circuit Court of Appeals the Government thought that the cases of *United States v. Erie Railroad Company*, 237 U. S. 402, and *United States v. Chicago, Burlington & Quincy Railroad Company*, 237 U. S. 410, were conclusive in favor of its contention. The cases of *Louisville & Jeffersonville Bridge Company v. United States*, 249 U. S. 534, and *United States v. Brooklyn Eastern District Terminal*, 249 U. S. 296, since decided, would seem to put the question beyond a doubt. In the two former cases it was held that the act in question applies to a train made up in one yard while it is being moved from that yard to another yard of the same company. The court distinguished between operations in the yard necessary to assemble the cars in trains, or to break up trains,

from the movement of trains after once made up and said:

When a train is thus made up and is proceeding on its journey it is within the operation of the air-brake provision. (237 U. S. 407-408.)

This language was used in speaking of a train which was made up in one yard of the company and then moved to another yard of the same company and there broken up. In the statement of the case the court mentioned the fact that between two yards the trains were moved over a main line. The error in the present judgment is that the court has made this incidental fact the controlling fact in the case.

In *United States v. Chicago, Burlington & Quincy Railroad Company, supra*, it was said:

According to the fair acceptation of the term they were trains in the sense of the statute. The work in which they were engaged was not shifting cars about in a yard or on isolated tracks devoted to switching operations, but moving traffic over a considerable stretch of main-line track—one that was a busy thoroughfare for interstate passengers and freight traffic. Every condition suggested by the letter and spirit of the air-brake provision was present. And not only were these trains exposed to the hazards which that provision was intended to avoid or minimize, but unless their engineers were able readily and quickly to check or control their movements they were

a serious menace to the safety of other trains which the statute was equally designed to protect. (237 U. S. 412.)

Every condition here named existed in the present case except that the defendant company does not itself use the track between these two yards for main-line purposes—that is, for operating trains—except so-called transfer trains, between the yards. But the decision in the case referred to was not based upon the accidental fact that the company did so use the track there in question but upon the fact that trains were being moved from one yard to another and not in the work of making up or breaking up trains, and importance was attached to the fact that the movement of the trains was liable to bring them into collision with other trains using the same track. This element is equally present in the instant case, for the track was used by two other companies in running through trains and it crossed tracks used by three other companies and also crossed streets, one of which was used by street cars. In the case referred to it is made plain that no importance is to be attached to the fact that the track is or is not called a main line or that the men operating the trains are or are not called yard or switching crew, for it is said that "the controlling test of the statute's application lies in the essential nature of the work done rather than in the names applied to those engaged in it."

If there can be any doubt as to what was intended to be decided in the cases already mentioned this doubt is certainly removed by the case of *Louisville*

& *Jeffersonville Bridge Company v. United States, supra*. In that case the company operated no through trains but merely operated a terminal, its business being to transfer cars brought into its yards by other railroad companies. A train of 26 cars was made up in one end of the company's yard and then transferred through the yard and into the yard of another company. After holding that an engine and 26 cars, assembled and coupled together, constituted a train within the meaning of the act, the court said:

The work done with the cars, as described, was not a sorting, or selecting, or classifying of them, involving coupling and uncoupling, and the movement of one or a few at a time for short distances, but was a transfer of the 26 cars as a unit from one terminal into that of another company for delivery, without uncoupling or switching out a single car, and it can not, therefore, with propriety be called a switching movement.

The language just quoted describes precisely the train's movement involved in the present case with the single exception that the transfer was between two yards of the same company instead of from a yard of one company to a yard of another. In that case the movement was for a distance of only 2,600 feet. Here the train was moved 4 miles. In that case the controlling facts were recited as follows:

This is not only a train movement, but it would be difficult to imagine one in which the control of the cars by train brakes would be more necessary, in order to secure that safety

of employees, of passengers and of the public which it is the purpose of the act to secure, by requiring that engineers shall be given control sufficient to stop any train they may be moving promptly on the first signal or sight of danger. The mere inertia of 26 cars, which must usually be loaded, and especially when running 15 miles an hour, would render it impossible to control or to stop them promptly with power-brakes operative only on the engine, and the ability to use such brakes on the entire train must often mean the difference between safety and serious accident when running, as here, in a crowded yard, across busy city streets and on main line tracks of railroads. (Page. 538.)

All that was here said is equally true in this case and is conclusive against the correctness of the judgment below.

In the case of *United States v. Brooklyn Eastern District Terminal*, while the statute involved was not the safety appliance act but the hours of service act, the question involved was whether the movement of trains or drags of cars from one part of the company's yard to another part was a *train* movement, and the court said:

It is now admitted that the Terminal is engaged in interstate commerce; and it is clear that at least "switching crews" engaged in moving at one time a locomotive with 7 or 8 cars between the docks and the warehouses or team tracks, a distance of nearly a mile, are engaged in the movement of a "train."

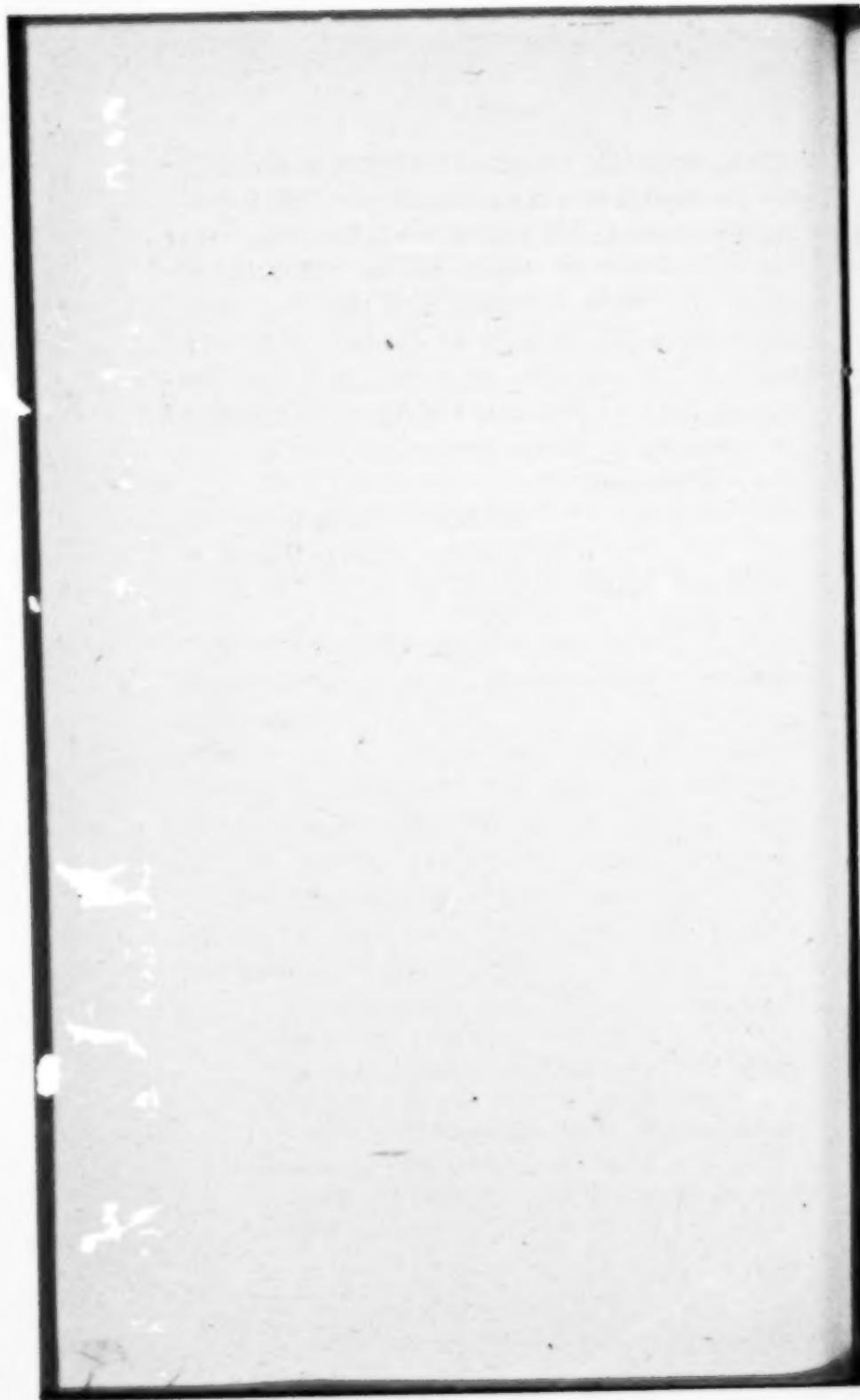
It is respectfully submitted that whether the track now involved is or is not a main line is of no importance whatever; that even if it was important that the track should be a main-line track that fact is established when it appears that two other companies did use the track for the operation of through trains or for main-line purposes; and that the judgment of the Circuit Court of Appeals is therefore erroneous and should be reversed.

Respectfully,

WILLIAM L. FRIERSON,
Assistant Attorney General.

OCTOBER, 1919.





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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. [REDACTED] 88

THE UNITED STATES,

Petitioner,

v.

NORTHERN PACIFIC RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENT.

CHARLES W. BUNN,
D. F. LYONS,



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 339.

THE UNITED STATES,

Petitioner,

v.

NORTHERN PACIFIC RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENT.

The Safety Appliance Act involved in this case (Act of March 2, 1893, 27 Stat. 531) makes it unlawful for any common carrier engaged in interstate commerce by railroad "to run any train" in such traffic that has not a sufficient number of cars "so equipped with power or train brakes that

the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose." The amendatory act of March 2, 1903, (32 Stat. 943) extended the requirements of the original act to "all trains * * * used on any railroad engaged in interstate commerce."

Prior to the decision of this court in the case of *United States v. Erie Railroad Co.*, 237 U. S. 402, and the decision in the case of *United States v. Chicago, Burlington & Quincy Railroad Co.*, 237 U. S. 410, there were many conflicting opinions in the Circuit Courts of Appeals as to the meaning of the word "train" as used in this act. In these two cases, however, this court clearly defined the term and laid down a simple rule of easy application that did away with the uncertainty that had prevailed. Short abstracts from the opinions in those cases will suffice to show what a "train" is.

In the case of *United States v. Erie Railroad Co.*, the Court, after analyzing the Safety Appliance Acts, said:

"It will be perceived that the air-brake provision deals with running a train, while the other requirements relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up and is proceeding on its journey it is within the operation of the air-brake provision. But it is otherwise with

the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains which have completed their run are broken up. These are not train movements but mere switching operations, and so are not within the air-brake provision." (Page 407.)

Counsel for the government repeatedly suggests in his brief that the lower court was mistaken in considering the fact that the movements in this case were not main line movements to be of controlling importance. But the court below only did what this court did in the case of *United States v. Erie Railroad Co.* and in *United States v. Chicago, Burlington & Quincy Railroad Co.* In the *Erie* case this court said:

"We are persuaded that the transfer trains moving from Jersey City and Weehawken to Bergen and vice versa came within the purview of the air-brake provision. They were made up in yards like other trains and then proceeded to their destinations over main-line tracks used by other freight trains, both through and local. They were not moving cars about in a yard or on tracks set apart for switching operations, but were engaged in main-line transportation, and this in circumstances where they had to pass through a dark tunnel, over switches leading to other tracks and across passenger tracks whereon trains were frequently moving. Thus it is plain that, in common with other trains using the same main-line tracks, they were exposed to hazards which made it essential that appliances be at hand for readily and quickly checking or controlling their movements." (Page 408.)

In the *Burlington* case the train movement was between two freight yards on opposite sides of

the Missouri River. This court said that "the track connecting them is one by which passenger and freight trains enter and leave the city, in other words, the main-line track." (Page 411.) Referring to these trains, the court said, "the work in which they were engaged was not shifting cars about in a yard or on isolated tracks devoted to switching operations, but moving traffic over a considerable stretch of main-line track—one that was a busy thoroughfare for interstate passengers and freight traffic." (Page 412.) Furthermore, in every case decided in a district court or circuit court of appeals since the *Erie* and *Burlington* cases, in which a railroad company has been found guilty of violating the requirements of the law as to air brakes, the transportation was in part over a main-line track.

This court drew a distinction between switching operations and main-line operation for the reason that trains are operated on a main line at high speed, under train orders or by time card or a system of block signal operation, while on tracks devoted to switching operations, trains must proceed under control. Certain trains on the main line, by virtue of train orders or time cards, have the right of way and consequently travel at high speed. In a yard an engineer must be ready and able to stop his train at any time. The only way in which he knows whether he can use a given track or not is by looking to see if it is in use. Movements are not controlled by train orders or time cards or block signals but all movements have the

universal characteristic of switching, *viz.*, visual control.

We submit therefore that in the language of the decisions quoted from, the test of the applicability of the Act to a given movement is this:

Have the engine and cars "been assembled for a run or trip along the road"? Is the railroad "moving cars about in a yard or on tracks set apart for switching operations," or is it "engaged in main-line transportation"? Is the work "shifting cars about in a yard or on isolated tracks devoted to switching operations," or "moving traffic over a considerable stretch of main-line track"? It is clear that if the cars are being moved about on "isolated tracks devoted to switching operations" the Act does not apply. If we apply this test to the facts of this case we shall find that the decision of the court below follows what this court has decided.

THE FACTS.

Two transfer movements are in question between points in Duluth known as "Rice's Point" and "Furnace." In the Government's brief these points are repeatedly referred to as separate yards. That is not the fact. They are but different points in one set of switching tracks. (Transcript, pp. 64 and 65.) There is of course here, as in every switching district, one track from which numerous other tracks branch out, but it is not a main line or anything that resembles a main line. The Gov-

ernment's principal witness, an experienced railroad man, employed by the Interstate Commerce Commission as a Safety Appliance Inspector for many years, characterized the track as follows: "It is operated as a lead switch track, that is, to include parts of yards." (Transcript, p. 31.) These points are wholly unlike the two yards referred to in the *Burlington* case or the three separate yards referred to in the *Erie* case. Of the yards referred to in the *Burlington* case this court said: "Both yards are used for receiving and breaking up incoming trains, assembling and starting outgoing trains, and assorting, storing and distributing cars." Of the yards referred to in the *Erie* case the court said: "They lie from two to three and one-half miles apart, are not so linked together so that cars may be moved from one to another with the freedom which is usual and essential in intra-yard movements, and are in actual practice treated as separate yards."

Defendant's exhibit "A" in the transcript shows the geography. The red lines on this map are main tracks. There is shown inside the main track, that is between the main track and the water, extending between "Rice's Point" and "Furnace" through points marked "Boston" and "Berwind", a system of switching tracks. Rice's Point, Furnace, Boston and Berwind are not stations and freight is not billed from one of these points to another. They are names used to indicate near-by industries or wharves, except Rice's Point, which

is the name of a point extending into the lake. Though one of the transfers in question moved in the instance here involved from Furnace to Rice's Point without setting out cars, both transfers customarily, or at least frequently, would pick up and set out cars all the way along (Transcript, pp. 64, 65). Freight cars are never consigned from one point to another within this district, but those picked up go beyond the district, those set out come from beyond the district, the trains being made up and broken at Rice's Point. At Rice's Point there are fifty-five tracks, each four thousand feet long. From there to Furnace the number of tracks varies, being fifteen at Furnace, nine at Herwind, and six or seven at Boston (Transcript pp. 60, 61). There are many industries and frequent turnout tracks within the district and the whole is operated as one yard (Transcript p. 65). No trains move on schedule, or train orders, or time cards, and there are no block signals, or other signals; no train has the right of way over any other (Transcript p. 62). There is but one operating rule, which is that all trains must move at such speed that they can be stopped within vision (Transcript pp. 62, 68). No passenger trains whatever and no through or local freight trains move on the tracks (Transcript p. 63). For a certain distance a part of the tracks is used by two other railroad companies, one, the Duluth, Missabe & Northern Railway Company, for transferring cars between its docks and the United States Steel Company's plant, some six or eight miles distant, the other, the Du-

luth & Iron Range Railroad Company, for a small movement of logging trains, something like one train a day. But the trains or transfers (whichever they are) of these companies move in this district without train orders, time cards or signals, and under the one rule of movement by vision (Transcript pp. 50, 66).

By the defendant's book of rules a main line is "A track extending through yards and between stations, upon which trains are operated by timetable or train order, or the use of which is controlled by block signals." (Transcript p. 63). Defendant's rules and practice distinguish between train movement and switching movement by the facts we have stated.

The facts differentiate the case fundamentally from *United States v. Erie Railroad Co.*, 237 U. S. 402, and *United States v. Chicago, Burlington & Quincy Railroad Co.*, 237 U. S. 410. In the *Erie* case the movement in question was between two independent yards over intervening main line tracks used by other trains, both through and local (page 408); the trains did not move on "tracks set apart for switching operations, but were engaged in main-line transportation" (page 408); no cars were switched out of or into these transfers while on their way from one yard to another (p. 406); the yards at Jersey City, Weehawken and Bergen "are not so linked together that cars may be moved from one to another with the freedom usual and essential in intra-yard movements, and in ac-

tual practice are treated as separate yards" (p. 406); each so-called yard was a station at which freight, both local and interstate, was accepted and delivered as shown in the defendant's tariffs (p. 404); the transfers moved over the same line on which "fifteen regular through and local freight trains are moved each day." (p. 405).

In the *Burlington* case the movement was between two freight yards on opposite sides of the Missouri river over a main line track connecting them, which was a track by which passenger and freight trains entered and left the city (p. 411); each train was moved as a unit from one yard to the other without switching on the way, and not infrequently was both preceded and followed by other trains, passenger and freight (p. 412).

The matter of controlling importance in both decisions is that the movement was over main line; that is, line on which trains are operated at high speed under train orders, or time schedule, or block signals. It was a "run or trip along the road." On main line tracks certain trains by virtue of their orders or time cards have the right of way and consequently move at high speed. On the contrary, trains are required in the district in question to proceed under control; this is the one rule of operation, that the engineer must be ready and able to stop at any place. He protects himself and looks to see whether any track is in use.

Counsel states that the track over which the transfers moved was a main line track in fact be-

cause two other companies used the track for main line purposes. As we have stated, one railway company sometimes uses a portion of this track in getting one log train a day to a mill and another railway company often uses a portion of the track when its trains leave its dock and before they get out on its own main line, but the statement that they use the track for main line purposes is wholly inaccurate and not supported by the evidence. When a Duluth & Iron Range log train leaves its main line it runs along the Northern Pacific main line until it reaches a point where it is necessary for it to go onto the set of tracks here involved. It then immediately loses its character as a main line train. It has no greater or different rights than any engine and cars switching in this switching district. It no longer moves at high speed under a train order or on a train schedule or by block signals. It moves over any track that may happen to be open. It proceeds under yardmaster's orders at slow speed, under control, ready to stop within vision. The same is true of the Duluth, Missabe & Northern trains. (Trans. pp. 50, 55, 66, 67.) It is obvious this is not main-line operation.

CASES CITED BY THE GOVERNMENT.

Since this case was decided by the Circuit Court of Appeals the case of *Louisville & Jeffersonville Bridge Co. v. United States*, 249 U. S. 534, has been decided. The decision not only follows the *Erie* case and the *Burlington* case, but emphasizes the same facts that were emphasized in those cases.

The movement was one of twenty-six cars from a yard of the Bridge Company to a yard of the Illinois Central Railroad Company. This court made the following references to the fact that the movement was a main-line movement: "Part of this movement in the Bridge Company's yard, how much does not appear, was over a main line track * * *." (Page 537.) "A short distance from the exit from the Bridge Company's yard the cars entered upon a track of the Illinois Central Railroad Company, used as a main line by both the Big Four and the Chesapeake & Ohio Companies, and after they had been pushed westerly on that track a distance of 1100 feet, they were stopped on this main track. Next, reversing the movement, the engine, now pulling the cars, moved easterly over three city streets at grade a distance of 1300 feet on a track used by the Chesapeake & Ohio Company for its through main line trains, and stopped on that track. Again reversing, the engine, now pushing the cars, ran westerly over three city streets at grade a distance of 1300 feet, still on the track used as a through main line track by the Chesa-

peake & Ohio Company, and then into the Illinois Central yard, where the cars were delivered." (Page 537.) "The movement of this train of cars, 1100 feet in length, was for a distance of over three-quarters of a mile, and involved crossing, at grade, three city streets once, two city streets twice, one street three times, and a main track movement of at least 2600 feet, with two stops and startings on the main track." (Page 538.) While the court refers to the movement across city streets, it was doubtless for the purpose merely of indicating the character of the movement as being a journey from one yard to a distant and entirely separate yard.

Counsel cites the recent decision of this court in *United States v. Brooklyn Eastern District Terminal*, 249 U. S. 296, as holding that a movement of a drag of cars from one part of a yard to another part of the same yard is a train movement. That case involves the Hours of Service Act. One of the points made by counsel for the Terminal Company, as stated in the report of the case, was this: "Aggregations of cars, however many, while in process of being switched in switching yards by switching locomotives, are not 'trains'; to be such they must be proceeding on a journey from one point to another on the main line of the railroad. This distinction is made in the following: *United States v. Erie R. R. Co.*, 237 U. S. 402; *United States v. Chicago, Burlington & Quincy R. R. Co.*, 237 U. S. 410, etc." (Page 299.) The Court commented on this contention as follows:

"It is now admitted that the Terminal is engaged in interstate commerce; and it is clear that at least 'switching crews' engaged in moving at one time a locomotive with seven or eight cars between the docks and the warehouses or team tracks, a distance of nearly a mile, are engaged in the movement of a 'train.' The decisions under the Safety Appliance Acts depend upon the particular context in which the word 'train' there occurs, and are not here applicable. Compare *United States v. Erie R. R. Co.*, 237 U. S. 402, 407-408." (Page 307.)

This is far from being a repudiation of the view of the court's holding in the *Erie* case, held by counsel for the Terminal, but is rather an admission of its correctness and a statement that it does not apply to an Hours of Service Act case.

We now have a plain workable rule that effectuates the intention of Congress in passing the Act. "Isolated tracks devoted to switching" and "main-line operation" are terms easily understood. The Government has not stated a different and better rule and has not suggested any different meaning for the word "train" than that given by this court. The only alternative is to hold that every movement of an engine and cars is a train movement and to require air to be used in every such movement. This would of course make the work of switching cars practically impossible.

The testimony in this case shows that to use air for the movement complained of would mean a great delay to business and an increase of expense by requiring the use of more engines and cars. (Trans. p. 67.) The evidence further shows that

there have been no accidents on these tracks due to a failure to use air (Trans. pp. 66, 70). It is not intended to suggest that requirements of economy should create exceptions to the law, but only to suggest facts doubtless considered by Congress when it restricted the air brake requirements to *train* movements.

We submit there was no violation of the Safety Appliance Act and the judgment of the court below was correct.

CHARLES W. BUNN,

D. F. LYONS,

For Respondent.

Opinion of the Court.

254 U. S.

engaged in switching, classifying and assembling cars in a yard to make up a train. P. 254.
It is not the duty of courts applying the act to weigh dangers incident to particular railway operations. P. 255.
255 Fed. Rep. 655, reversed.

THE case is stated in the opinion.

Mrs. Annette Abbott Adams, Assistant Attorney General, with whom *The Solicitor General* was on the brief, for the United States.

Mr. D. F. Lyons, with whom *Mr. Charles W. Dunn* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Northern Pacific Railway Company owns and uses in interstate commerce a terminal railroad along the waterfront of Duluth extending from Rice's Point to Furnace, a distance of four miles. It was sued in the District Court of the United States for the District of Minnesota for violating the Safety Appliance Act¹ by operating over the whole of this road, in September, 1916, two transfer trains, without complying with the requirement that 85 per cent. of the train brakes be coupled so as to be under engine control. One train consisted of a locomotive and forty-eight cars, the other of a locomotive and forty cars. The company contended that the provision of the Safety Appliance Act did not control the operation because this terminal road was not part of a main line; that neither passenger nor freight trains, through or local, moved on it; that on it trains are not operated by time-tables, train

¹ Act of March 4, 1903, c. 196, § 1, 27 Stat. 531, as amended by Act of March 2, 1903, c. 976, § 2, 32 Stat. 943; and order of Interstate Commerce Commission dated June 6, 1910.

orders, or time-cards, nor is the use of the track controlled by block signals; that on it no train has right of way over another; but that there the single operating rule applies which requires all trains to move at such speed that they can be stopped at vision, and that trains are under the yardmaster's orders. The company's contention was sustained by the District Court which directed a verdict for defendant; and the judgment entered thereon was affirmed by the Circuit Court of Appeals for the Eighth Circuit. 255 Fed. Rep. 655. The case comes here on writ of certiorari. 249 U. S. 597.

These additional facts are material: The road for a distance of a mile at the beginning and for less at the end is single track. It crosses at grade two streets on one of which run street cars. It crosses at grade, at five places in all, lines of three independent railroad companies which run freight trains to piers situated between Rice's Point and Furnace. One of these companies also runs passenger trains across defendant's tracks. In addition, two other independent companies use, under the usual traffic-right agreements, about a mile of this railroad as a part of their freight lines to piers situated between Rice's Point and Furnace. These four miles of railroad owned by the Northern Pacific are not used by it for switching or assembling cars. The switching, assembling and classification of cars for its through and local freight is done in the Rice's Point yard where there are fifty-five tracks, each four thousand feet long and at Furnace, where there are fifteen tracks, cars are also switched and assembled. At Berwind and Boston, two intermediate points, where there are respectively nine and six tracks, cars are frequently set out or picked up by transfer trains. The transfer trains here in question appear to have run solid between Rice's Point and Furnace. Trains are run by the Northern Pacific on this line at a speed varying from three to eighteen miles an hour.

Opinion of the Court.

254 U. S.

The company contends that the rule applied in *United States v. Erie R. R. Co.*, 237 U. S. 402; *United States v. Chicago, Burlington & Quincy R. R. Co.*, 237 U. S. 410, and *Louisville & Jeffersonville Bridge Co. v. United States*, 249 U. S. 534,¹ is not applicable, because here, unlike those cases, no part of the trains' journey was performed on a track used as part of the main line of the Northern Pacific system. If use of the road as part of a main line were essential in order that operations on it be controlled by the Safety Appliance Act, the requirement would be satisfied in this case by the fact that two independent companies use the road for freight trains under air control and that the passenger trains of another company cross it. "Not only were these [the defendant's] trains exposed to the hazards which that provision was intended to avoid or minimise, but unless their engineers were able readily and quickly to check or control their movements they were a serious menace to the safety of other trains which the statute was equally designed to protect." *United States v. Chicago, Burlington & Quincy R. R. Co.*, *supra*. But there is nothing in the act which limits the application of the provision here in question to operations on main line tracks. The requirement that train brakes shall be coupled so as to be under engine control is in terms (32 Stat. 943) applicable to "all trains . . . used on any railroad engaged in interstate commerce." It is admitted that this railroad is engaged in interstate commerce; and the cases cited show that transfer trains, like those here involved, are "trains" within the meaning of the act. A moving locomotive with cars attached is without the provision of the act only when it is not a train; as where the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making

¹ That case was decided by this court, April 21, 1919. The decision of the Circuit Court of Appeals in the case at bar was rendered January 15, 1919.

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251.

Syllabus.

up trains. Congress has not imposed upon courts applying the act any duty to weigh the dangers incident to particular operations; and we have no occasion to consider the special dangers incident to operating trains under the conditions here presented.

The judgment of the United States Circuit Court of Appeals is

Reversed.

UNITED STATES *v.* NORTHERN PACIFIC RAILWAY COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 88. Argued November 11, 12, 1920.—Decided December 6, 1920.

The requirement of the Safety Appliance Acts that all trains used on any railroad engaged in interstate commerce shall have a certain per cent. of their cars equipped with power or train brakes under control of the engineer, applies to "transfer trains" moving between two yards of a railroad company, over a "transfer" track which crosses at grade streets and lines of independent railroad companies where freight and passenger trains are run, and which also is used, in part, by independent railroad companies for their freight trains. P. 253.

A moving locomotive and cars attached are without the provision of the act only when they are not a train; as where the locomotive is

¹ Compare *Davis v. Hines*, 6 Oh. St. 473, 478; *Litchtenstadt v. Rose*, 98 Ill. 643; *Taylor v. Pierce*, 174 Ill. 9, 12; *Wilson v. Vance*, 55 Ind. 584, 591.